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EDITOR'S NOTE

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No. 86-836-CFX
Status: GRANTED

Title: Hazelwood School District, et al., Petitioners
v.
Cathy Kuhlmeier, et al.

Docketed:
November 22, 1986

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Baine Jr., Robert P.

Counsel for respondent: Edwards, Leslie D.

Entry	Date	Note	Proceedings and Orders
1	Nov 22 1986	G	Petition for writ of certiorari filed.
2	Dec 18 1986		Brief of respondents in opposition filed.
3	Dec 18 1986	D	Motion of respondents for leave to file appendix to brief in opposition on oversized paper filed.
4	Dec 23 1986	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
5	Dec 18 1985		DISTRIBUTED. January 16, 1987
6	Dec 31 1986	X	Reply brief of petitioners Hazelwood Sch. Dist., et al. filed.
7	Dec 23 1986		REDISTRIBUTED. January 16, 1987
8	Jan 20 1987		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
9	Jan 20 1987		Motion of respondents DENIED.
10	Jan 20 1987		Petition GRANTED.
11	Feb 10 1987		***** Record filed.
12	Feb 10 1987		Certified copy of original record and proceedings, 5 volumes, received.
14	Feb 13 1987		Order extending time to file brief of petitioner on the merits until March 30, 1987.
15	Mar 23 1987		Brief amicus curiae of Pacific Legal Foundation filed.
16	Mar 30 1987		Joint appendix filed.
17	Mar 30 1987		Brief of petitioners Hazelwood Sch. Dist., et al. filed.
18	Mar 30 1987	G	Motion of National School Boards Association, et al. for leave to file a brief as amici curiae filed.
19	Mar 30 1987	G	Motion of School Board of Dade County, Florida, for leave to file a brief as amicus curiae filed.
21	Apr 15 1987		Order extending time to file brief of respondent on the merits until May 26, 1987.
22	Apr 20 1987		Motion of National School Boards Association, et al. for leave to file a brief as amici curiae GRANTED.
23	Apr 20 1987		Motion of School Board of Dade County, Florida, for leave to file a brief as amicus curiae GRANTED.
24	Apr 15 1987		Lodgings received.
25	May 26 1987		Brief amicus curiae of Student Press Law Center, et al. filed.
26	May 26 1987	G	Motion of People for the American Way for leave to file a brief as amicus curiae filed.
27	May 26 1987	G	Motion of American Society of Newspaper Editors, et al. for leave to file a brief as amici curiae filed.
28	May 26 1987		Brief of respondents Cathy Kuhlmeier, et al. filed.
29	May 26 1987	G	Motion of American Civil Liberties Union, et al. for

Entry	Date	Note	Proceedings and Orders
30	May 26 1987	G	leave to file a brief as amici curiae filed. Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae filed.
31	May 29 1987		Lodging received.
32	May 26 1987	G	Motion of Planned Parenthood Federation of America, Inc., et al. for leave to file a brief as amici curiae filed.
33	Jun 8 1987		Motion of People for the American Way for leave to file a brief as amicus curiae GRANTED.
34	Jun 8 1987		Motion of American Society of Newspaper Editors, et al. for leave to file a brief as amici curiae GRANTED.
35	Jun 8 1987		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
36	Jun 8 1987		Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae GRANTED.
37	Jun 15 1987		Motion of Planned Parenthood Federation of America, Inc., et al. for leave to file a brief as amici curiae GRANTED.
38	Jul 1 1987		CIRCULATED.
39	Jul 20 1987		SET FOR ARGUMENT. Tuesday, October 13, 1987. (3rd case).
40	Oct 3 1987	X Reply	brief of petitioners Hazelwood Sch. Dist., et al. filed.
41	Oct 13 1987		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

86-838①

SUPREME COURT, U.S.
FILED

NOV 22 1986

JOSEPH F. SPANOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

CATHY KUHLMIEER, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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EDITOR'S NOTE

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ISSUED.

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QUESTIONS PRESENTED

The Hazelwood East *Spectrum* is a school-sponsored high school newspaper produced and published by the Journalism II class. The principal prohibited publication of articles that profiled pregnant students and contained quotations by students citing reasons for their parents' divorces. The district court found the principal's actions constitutional in that he reasonably acted to protect the privacy of the students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, and to insure fairness to the divorced parents whose actions were characterized. The court of appeals reversed, holding that "Spectrum" is a "public forum" and that, therefore, the principal could only prevent publication of the articles at issue if their publication would subject the school to tort liability.

The questions presented are:

1. Is a school-sponsored high school newspaper produced and published by a journalism class as part of the school adopted curriculum, under its teacher's supervision and subject to the principal's review, a "public forum" for purposes of the First Amendment?
2. If so, may school authorities act to prevent "invasions of the rights of others," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), by school-sponsored newspapers only when failure to do so would subject the school to tort liability?

LIST OF PARTIES

The petitioners before this Court are the Hazelwood School District, Dr. Thomas S. Lawson, superintendent of the Hazelwood School District, Dr. Francis Huss, assistant superintendent of the Hazelwood School District, Robert Eugene Reynolds, principal of the Hazelwood East High School, Howard Emerson, a teacher in the Hazelwood School District, and the following members of the Hazelwood School District Board of Education: Charles E. Sweeney, Joseph E. Donahue, Gwendolyn L. Gerhardt, August A. Busch, Jr., Ann Gibbons, and James E. Arnac. These petitioners were also parties below. The respondents, also parties below, are Cathy Kuhlmeier, Leslie Smart, and Leanne Tippet West. The Student Press Law Center, Journalism Education Association and the St. Louis Globe Democrat, Inc. entered appearances in the proceedings below as amici curiae.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

CATHY KUHLMIEER, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The petitioners Hazelwood School District, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered July 7, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 795 F.2d 1368 (8th Cir. 1986) and is reprinted in the Appendix. (App. A-1). The memorandum decision of the United States District Court for the Eastern District of Missouri (Nangle, C. J.) is reported at 607 F.Supp. 1450 (E.D.Mo. 1985) and reprinted in the Appendix. (App. A-23).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on July 7, 1986. Petitioners sought rehearing and rehearing en banc. The petition for rehearing was denied on August 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Hazelwood School District operates public elementary and secondary schools within the State of Missouri, including the Hazelwood East High School. On August 19, 1983, Respondents, former students in the Journalism II class at Hazelwood East, brought this action for declaratory relief pursuant to 28 U.S.C. §§2201, 2202, and damages pursuant to 42 U.S.C. §§1983, 1988. The District Court had subject matter jurisdiction by virtue of 28 U.S.C. §§1331, 1343(3), (4). Respondents alleged that their rights under the First and Fourteenth Amendments had been abridged by Petitioners' refusal in May 1983 to permit publication of certain articles in the Hazelwood East *Spectrum*, a school-sponsored newspaper produced by Hazelwood East's Journalism II class.

On May 9, 1985, after a three-day trial to the court, the Honorable John F. Nangle held Respondents' First Amendment rights were not violated when Petitioners' prohibited publication of articles containing "personal accounts" of pregnant high school students and students' explanations why their parents' divorced. He found that Petitioners reasonably acted to protect the privacy of the students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, and to insure fairness to the divorced parents whose actions were characterized.

During the 1982-1983 academic year, the Hazelwood East curriculum included two journalism classes, "Journalism I"

and "Journalism II." Enrollment in Journalism II required successful completion of Journalism I. Students in Journalism I were taught the fundamentals of reporting, writing, editing, layout, publishing and journalistic ethics. The instruction continued in Journalism II, but the primary activity was production of Hazelwood East's school-sponsored newspaper, *Spectrum*. "This activity is best described as a classroom exercise or 'lab' in which Journalism II students were given an opportunity to apply the knowledge and skills derived from the instruction they received." (App. A-26).¹

The Hazelwood School District financed *Spectrum*, although some expenses were defrayed through newspaper sales to students. The district court found that the teacher of Journalism II "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*," and "was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." Each issue of the paper was also to be submitted to the principal for prepublication review.² (App. A-29).

¹ The Hazelwood East Curriculum Guide described Journalism II as a course that "provides a laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I." (App. A-26).

² Board Policy 348.51 cautioned school-sponsored student publications not to "restrict free expression or diverse viewpoints within the rules of responsible journalism." It also specified that school sponsored publications "are developed within the adopted curriculum and its educational implications and regular classroom activities," and

[n]o material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the educational process.

Board Policy 348.51 (App. A-33 to A-34).

Members of the Journalism II class researched and wrote the two articles that prompted the instant controversy. They were to appear with other articles on pages 4 and 5 of a 6-page, May 13, 1983 issue of *Spectrum*. Three articles were to run along the top half of pages 4 and 5 and share a common headline:

Pressure Describes It All For Today's Teenagers
Pregnancy Affects Many Teens Each Year

The first article in this top group of three surveyed teenage sexuality and pregnancy, with statistics on birth control, parental attitudes, and abortion. The second article discussed a proposed "Squeal Law" that would require federally funded clinics to notify parents when a teenager sought birth control assistance.

The third article consisted of separate "personal accounts of three Hazelwood East students who became pregnant." The introduction to the article stated that "all names have been changed to keep the identity of these girls a secret." In each of the three accounts, the student discussed her reaction to becoming pregnant, her plans for the future, her relationship with the father, the reaction of her parents, and details of her sex life and use or non-use of birth control methods.

(App. A-37)

The three articles along the bottom half of pages 4 and 5 were entitled "Teenage Marriages Face 75% Divorce Rate," "Runaways and Juvenile Delinquents Are Common Occurrences In Large Cities", and "Divorce's Impact on Kids May Have Lifelong Affect." The latter article

dealt with the frequency and causes of divorce, as well as the affect (*sic*) of divorce on children. The article contained a quote from a student who was identified only as a "Junior," as follows:

"My dad didn't make any money, so my mother divorced him."

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,"....

A Freshman identified by name as "Diana Herbert" gave the following quote:

"My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realized (*sic*) it wasn't me," added Diana.

Similar quotes were provided from students identified by name as Susan Kiefer and Jill Viola.

(App. A-37 to A-38).

The student authors of the pregnancy profiles and "Divorce's Impact" story used questionnaires to research their articles. Each subject was told the information would be used in *Spectrum*. The three pregnant girls were told their names would not be used. They were not given, however, any instructions regarding parental consent, and there was no evidence such consent was obtained. The parents of the students quoted in the "Divorce's Impact" article were not "contacted to explain or rebut the quoted statements of their children." (App. A-38 to A-39).

The teacher of the Journalism II class left the school district for private industry on April 29, 1983, and the District appointed a substitute teacher, petitioner Howard Emerson, to supervise the Journalism II class's publication of the last two issues of the year. On May 10, 1983, Mr. Emerson, pur-

suant to the established prepublication review procedure, submitted galley proofs of the May 13 issue to the school principal, petitioner Robert Reynolds.

With respect to the personal accounts of three (3) Hazelwood East students who were pregnant, Mr. Reynolds was concerned that the girls had been described to the point where they could be identified by their peers. In addition, he objected to their discussion of their sexual activity.

(App. A-42). As for the "Divorce's Impact" article, Reynolds objected to the use of Diana Herbert's name and the students' quotations about reasons for their parents' divorces. "[H]e thought that fairness required that her parents be notified and given an opportunity to respond." (App. A-42 to A-43).

Mr. Reynolds asked Mr. Emerson what would have to be done to delete the stories in question and Mr. Emerson responded that pages 4 and 5 could be deleted and page 6 could be changed to page 4. Mr. Reynolds directed Mr. Emerson to effectuate this.

(App. A-40). Reynolds' superiors, petitioners Lawson and Huss, concurred in his decision.³

In analyzing the First Amendment issues, the district court distinguished between student speech "privately initiated and carried out independent of any school-sponsored program or activity," such as the black armbands involved in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and "student speech or conduct in the

³ After May 13, 1983 several copies of the deleted articles were circulated at Hazelwood East. Petitioners made no effort to stop this unauthorized distribution or punish the individuals responsible.

context of school-sponsored publications, activities or curricular matters.” (App. A-47 to A-48). In concluding *Spectrum* was a nonpublic forum, the district court noted that it was produced by members of the Journalism II class as taught by a faculty member in accordance with the Hazelwood East curriculum guide. A textbook was used and students received academic credit and a grade. The preparation of *Spectrum* was largely done during class. The district court found “the most telling facts are the nature and extent of the Journalism II teacher’s control and final authority with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by Hazelwood officials in the past.” (App. A-54).

Given that *Spectrum* was a nonpublic forum, the district court held that school officials need demonstrate only that there was a reasonable basis for their actions. He concluded Principal Reynolds had a legitimate concern that the three girls featured in the pregnancy profiles could be identified, given the small number (8 to 10) of pregnant students at Hazelwood East and the specific information disclosed in the article. “Such a loss of anonymity could have resulted in unwarranted invasions of privacy.” (App. A-55). He also credited the judgment of Hazelwood East school authorities that this material — particularly in the context of a school-sponsored, curricular publication — was not appropriate for some high school age readers and might create the impression that the school district endorsed the sexual norms of the article’s subjects.

Similarly, Reynolds had legitimate objections to the “Divorce’s Impact” story because it related students’ perceptions of the reasons for their parents’ divorces without availing the parents an opportunity to object, respond or

rebut these characterizations.⁴ As for deletion of all of pages 4 and 5, the trial court concluded that Reynolds reasonably believed that he had to make an immediate decision or no paper would be published, and that there was no time to make changes to the articles.

The United States Court of Appeals for the Eighth Circuit reversed. Judge Heaney, joined by Judge Arnold, held that *Spectrum* was a public forum “because it was intended to be and operated as a conduit for student viewpoint.” (App. A-5 to A-6). Therefore, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), governed any regulation of its content. Applying *Tinker*, the court of appeals concluded that Petitioners acted unconstitutionally because “the two articles objected to ... could not reasonably have been forecast to materially disrupt classwork, give rise to substantial disorder, or invade the rights of others.” (App. A-2). It found nothing to support fears that publication of the pregnancy case studies would create the impression the school endorsed the sexual norms of the pregnant students, analogizing an article in *Spectrum* to a book in a school library. It also dismissed Petitioners’ concerns that this material was inappropriate as a result of the age and immaturity of the high school reader, observing that “[t]he students in the high school, including the freshmen and sophomores, are aware of the [teenage pregnancy] problem, and it is unlikely that anything in the articles would offend their sensibilities.” (App. A-13).

As for what the court of appeals characterized the “heart of this case” — the invasion of privacy concerns —

⁴ The district court observed that Reynolds was unaware that Emerson had deleted Diana Herbert’s name in his galley proofs. Reynolds “conduct must be evaluated according to the facts known to him at the time he acted.” (App. A-56).

it held that when this Court in *Tinker* spoke of "invasion of the rights of others" it meant to refer only to tortious acts.

[S]chool officials are justified in limiting student speech, under this standard, only when publication of that speech could result in tort liability for the school. Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.

(App. A-14).

The court of appeals concluded that the pregnancy profiles and "Divorce's Impact" story were not tortious. It noted that the students quoted in the "Divorce's Impact" article had consented to publication. As for the pregnancy case study, the court of appeals observed that even if it was possible to identify the girls,

[t]he only tort action which, conceivably, could have been maintained against Hazelwood East had the pregnancy case study been published is that of invasion of privacy.... Certainly the parents of the girls could not maintain this tort against the school because the article did not expose any details of the parents' lives, only about the students, and they fully consented. Almost as inconceivable is the prospect of the fathers maintaining this tort action. The fathers were not named in the article, thus they could only be identified by persons who previously had knowledge of the revealed facts. Thus, there would have been no disclosure. We conclude that because no tort action based on the articles could have been maintained against Hazelwood East, school officials were not justified in censoring the two articles based on the *Tinker* "invasion of the rights of others" test.

(App. A-15).

Judge Wollman dissented. He thought the district court's findings amply supported its conclusion that *Spectrum* was not a public forum. He objected "to a collective first amendment right to publish a school-sponsored, faculty-supervised newspaper with the same lack of constraints enjoyed by the commercial press or, for that matter, a solely student-sponsored, extracurricular paper totally removed from the aegis of the school." (App. A-19 to A-20).

Respondents petitioned for rehearing, calling to the court of appeals' attention this Court's opinion in *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986), which reversed one of the principal authorities relied on by the panel. Rehearing was denied on August 27, 1986, with four judges (Ross, Fagg, Bowman and Magill) voting for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I.

Seventeen years ago, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court first considered the First Amendment rights of public high school students. Tinker's decision, in consultation with his parents, to wear a black armband onto school property did not involve expression within the framework of school-sponsored activities, such as a school newspaper, assembly, yearbook, or play.⁵ His armband did not involve curricular matters: what is taught in the classroom and how it is taught. It was a political statement — a protest against the Vietnam War. The armband restriction imposed by Des Moines School District officials "involved an unequivocal attempt to prevent students from expressing their viewpoint on a political issue." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49-50 n. 9 (1983); see also *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3163 (1986).

Even though viewpoint discrimination is the most objectionable form of state restriction on speech, the *Tinker* Court acknowledged that the scope of students' First Amendment rights must be "applied in light of the special characteristics of the school environment" and tempered by "the need for affirming the comprehensive authority of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 506, 507.

⁵ By "school-sponsored" we mean activity that receives school funding and is subject to school supervision. See *Student Coalition For Peace v. Lower Merion School District Board*, 776 F.2d 431, 433 n. 1 (3d Cir. 1985). Many high school First Amendment cases in the courts of appeals and district courts have, like *Tinker*, involved privately initiated, nonschool-sponsored activity, e.g., "underground" newspapers and leaflets. A number of these cases are cited in Judge Nangle's opinion. (App. A-48).

In striking that balance in *Tinker*, the Court observed that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible." *Id.* at 511.

In the years since *Tinker* the lower courts have attempted to divine its meaning for a variety of situations increasingly removed from the narrow case of viewpoint discrimination at issue there. These cases often concern content — but not viewpoint — regulation involving school-sponsored activities and the classroom itself. They, therefore, involve considerations beyond the problem of discipline that concerned the Court in *Tinker*: for example, the school board's control over curriculum, its legal liability for expressive activity that occurs in a school-sponsored publication or forum, and the implicit school endorsement that accompanies school-sponsored student expression. Efforts to apply *Tinker* to these situations have been complicated by this Court's evolving "public forum" doctrine. The result is widespread confusion over where the public forum doctrine ends, where *Tinker* begins, and how (or if) the two complement each other.⁶

⁶ Numerous commentators have noted the need for Supreme Court guidance in this area. E.g., Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex.L.Rev. 477, 478 (1981) ("The law concerning the first amendment in the schools has developed primarily in the lower federal courts, many of which have strayed from the Court's analysis in *Tinker*"); Huffman & Trauth, *High School Students' Publication Rights and Prior Restraint*, J.L. & Educ. 485, 486, 505 (1981) (United States Courts of Appeals "have reached extraordinarily different conclusions" and "[u]ntil such time as the Supreme Court considers issues of prior restraint in the school context, there is unlikely to be any uniform standard"); Note, *Administrative Regulation of the High School Press*, 83 Mich.L.Rev. 625, 627 (1984) ("Each circuit has thus been left to its own interpretation of the *Tinker* standard, the result being inconsistency both within a given circuit and among the circuits.").

The Eighth Circuit's opinion in this case is the most far reaching limitation to date on the authority of school boards, principals and teachers to regulate expression within school-sponsored programs that are an integral part of the school curriculum. By concluding that "a part of the school adopted curriculum" (App. A-9) is a public forum, the Eighth Circuit has interposed the judiciary not only between a principal and participants in school-sponsored programs, but between a teacher and his class. By holding that expression can be regulated to prevent "invasion of the rights of others" only when a failure to do so would subject the school board to tort liability, the Eighth Circuit has pinned decisionmaking by school authorities in a legal vise. As Judge Wollman observed in dissent:

The majority opinion consigns school officials to chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material. Although the commercial press can well afford to retain counsel to advise them daily on questions of possible liability, not many school districts possess similar resources.

(App. A-20).

Since there is no suggestion that Petitioners sought to prefer one viewpoint over another, this case presents the Court with an appropriate vehicle with which to delineate the role, if any, of First Amendment public forum analysis in evaluating regulation of expression within school-sponsored publications and activities. The Court can clarify the relevance, if any, of the *Tinker* standard in situations that do not involve viewpoint discrimination against privately initiated expression, but content-based regulation of curricular and school-sponsored activities. The Court can provide critically needed guidance on the meaning of "invasion of the rights of others" and whether

indeed school officials may act to protect privacy only on the basis of a legal assessment of the school's tort liability. In providing such guidance, the Court will resolve a conflict between the Eighth Circuit's ruling here and that of the Second Circuit in *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

II.

In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense and Education Fund*, 105 S.Ct. 3439 (1985), this Court distinguished between public forums — whether traditional or those intentionally created by the State — and nonpublic forums. If a forum for expression is a "public forum," any governmental content-based regulation, in order to weather First Amendment scrutiny, must be shown to serve a compelling state interest and be narrowly drawn to achieve that end. Similar regulations in the context of nonpublic forums must be reasonable and viewpoint neutral.

In determining that a school system's internal mail system was a nonpublic forum in *Perry Education Association*, this Court focused on whether "by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public." *Id.* at 47. Permission to use the mail system had to be obtained from the individual building principal and there was no evidence this permission was given "as a matter of course." "This type of selective access does not transform government property into a public forum." *Id.* at 47-48. See also *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-81 (1984) (public forum is by tradition or designation "open for participation by the public at large").

"The government does not create a public forum by inaction nor by permitting limited discourse, but only by opening a non-traditional forum for public discourse." *Cornelius*, 105 S.Ct. at

3449. In *Cornelius* this Court held that the Combined Federal Campaign, a charity drive aimed at federal employees, is a non-public forum because “[t]he Government’s consistent policy has been to limit participation in the CFC to ‘appropriate’ voluntary agencies and to require agencies seeking admission to obtain permission from federal and local campaign officials.” *Id.* at 3450.

Screening and selective access are therefore the touchstones of a nonpublic forum. A school-sponsored newspaper such as *Spectrum* is not “by policy or by practice” an expressive vehicle “for indiscriminate use” by the journalism students, let alone the general public. Not only was the newspaper subject to review by the principal, but the district court found that the teacher “was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content.” (App. A-29). Indeed, the teacher must assume this role if he is to “teach”: reinforcing his concept of good journalism by prohibiting publication until that standard — as he interprets it — is met. The Journalism II teacher selected the editorial staff, set the size and date of issues, assigned stories, critiqued and required modifications of drafts and edited the stories. (App. A-29, A-30 to A-31). He decided which articles prepared in the Journalism II class would be published. (App. A-27; Trial Tr. 1-137). “In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students.” *Ambach v. Norwich*, 441 U.S. 68, 78 (1979). “[S]chool faculty must regulate the content as well as the style of student speech in carrying out its educational mission.” *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3169 (1969) (Stevens, J., dissenting). In theory and in practice, therefore, access to and the content of *Spectrum* was heavily and properly regulated by the government *qua* teacher.

As the District Court found, and as the Eighth Circuit acknowledged, *Spectrum* was an integral part of the school cur-

riculum. (App. A-54 to A-55).⁷ It was designed as the laboratory exercise that constituted the Journalism II class. Students received academic credit and grades for their participation. “The Court has long recognized that local school boards have broad discretion in the management of school affairs.” *Board of Education v. Pico*, 457 U.S. 853, 863 (1982) (plurality opinion). Despite the substantial disagreement among members of the Court in *Pico* on the First Amendment limits to a school board’s authority to regulate the content of a secondary school library, virtually all members of the Court explicitly recognized that the judgment of school officials is entitled to greatest deference in matters of curriculum.⁸ As Justice Blackmun observed in his separate opinion, “the Court has recognized that students’ First Amendment rights in most cases must give way if they interfere with the school’s work or [with] the rights of other students to be secure and to be let alone,” [*Tinker*, 393 U.S., at 508], and such interference will rise to intolerable levels

⁷ The court of appeals concluded “*Spectrum* is not a curricula paper,” but at the same time conceded it “was a part of the school adopted curriculum.” (App. A-9). It characterized the editorial control of the Journalism II teacher as “minimal,” (App. A-2), but did not find any of the district court’s extensive findings on the extent of his control “clearly erroneous.” See *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 856-58 & n. 20 (1982); see also *Minnesota State Board v. Knight*, 465 U.S. 271, 308 (1984) (Stevens, J., dissenting). Therefore, the district court’s findings are binding. The relationship of the teacher to the newspaper does not involve mixed questions of law and fact that warrant *de novo* review by the court of appeals. See *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984). Moreover, public forum analysis focuses on the extent of the teacher’s authority — public forums are not created by “inaction” — and does not turn on whether a particular teacher exercises a light or heavy hand.

⁸ See *Pico*, 457 U.S. at 869 (plurality opinion of Brennan, J.); *id.* at 889 (Burger, C. J., dissenting); *id.* at 914-15 (Rehnquist, J., dissenting).

if public participation in the management of the curriculum becomes commonplace.” *Id.* at 878 n. 1 (Blackmun, J., concurring in part and concurring in the judgment).⁹

The Eighth Circuit’s decision has raised that interference to intolerable levels. Although this case involves a restriction on publication initiated by the principal, there is no constitutional distinction between the principal and the teacher. Both are state actors and judged by the same First Amendment standards. The logic of the Eighth Circuit’s opinion makes the teaching of journalism through the supervised publication of school-sponsored newspapers unworkable: the teacher cannot forestall publication of a piece that a student insists upon unless publication “would have materially disrupted classwork or given rise to substantial disorder in the school” or subjected the school to tort liability. For the Eighth Circuit, jurisprudence — not journalistic standards — dictate the content of school-sponsored newspapers. See also, e.g., *Reineke v. Cobb County School District*, 484 F.Supp. 1252, 1258, 1260 (N.D.Ga. 1980) (journalism teacher violated First Amendment when he excised sports article for improper journalistic form and deleted

⁹ Individual members of this Court have indicated that secondary schools and their ancillary activities are not public forums under the analytical framework adopted by the Court. See *Perry Education Assn.*, 460 U.S. at 70 n. 11 (Brennan, J., dissenting) (“It is noteworthy that *Tinker* involved what the Court would be likely to describe as a nonpublic forum.”); *Cornelius*, 105 S.Ct. at 3461 n. 3 (Blackmun, J., dissenting) (“By the Court’s reasoning, there would have been no basis for the holding in *Tinker*” since “[s]chools have never been identified as ‘quintessential public forums’ ” and “practice a policy of selective access.”) Since *Tinker* involved viewpoint discrimination, however, the result there is fully compatible with the conclusion that the secondary school and its activities are nonpublic forums, since viewpoint discrimination is subject to the strictest First Amendment scrutiny regardless of the type of forum involved.

paragraph of article, with author’s consent, to accommodate printer’s format suggestion).¹⁰

III.

A review of First Amendment challenges to regulation of school-sponsored publications and activities reveals not only the increasing frequency with which these issues arise, but also the confusion about when and how public forum analysis comes into play. Nor is there agreement on what distinguishes the curricular from the noncurricular and the constitutional significance of the distinction.

In *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977), a case relied on by the Eighth Circuit, a divided Fourth Circuit panel held that the school board violated their students’ First Amendment rights by barring publication of an article entitled “Sexually Active Students Fail to Use Contraception” in the faculty supervised, school-sponsored newspaper. Some students received academic credit for their work on the paper. The district court, whose reasons were adopted by the panel majority, labelled the newspaper a “public forum” because school officials had permitted “a wide variety

¹⁰ Cf. Note, *supra* note 6, at 633 n. 48: “A school has the power to set its curriculum, but where that curriculum is designed only to teach students the mechanics of writing and editing, curricular control should be limited to sloppy or ungrammatical expression, not expression dealing with ‘inappropriate’ topics. The school might be able to limit coverage of a curricular newspaper to certain issues, but it cannot prescribe the nature of this coverage.”

But how can journalism be “taught” without reference to the appropriateness of a topic and the manner in which an issue is covered? Presumably, these very considerations distinguish a journalism class from a basic English class: the latter is predominantly concerned with “sloppy or ungrammatical expression.”

of topics" to appear in the paper in the past.¹¹ There was no finding that school officials had permitted the publication of all proposed articles in the past or that any of the past articles had violated school board policy. The court assumed this particular article contravened school board policy on sex education. Since the newspaper was a public forum, however, the court found the article beyond the school board's control of curriculum in general and beyond the reach of its sex education policy in particular. Judge Russell dissented, finding it odd that the school administration can forbid a teacher from instructing on certain contraceptive practices but cannot prevent the same information from appearing in a school-sponsored newspaper. 564 F.2d at 157.

In *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D.Me. 1984), the district court granted a preliminary injunction barring a high school principal from publishing a yearbook that did not include the plaintiff's selected "senior quote" graphically describing the physical effects of the electric chair. The court acknowledged that the yearbook was "an integral part of the general program of secondary education" subject to faculty supervision. *Id.* at 1571. Nevertheless, it concluded that the yearbook was a public forum because in the past senior students had been permitted to "express their views, opinions, and ideas through the selection of quoted material" from secondary sources. *Id.* at 1570-71. The court also observed that even if the student editors and their faculty advisors had historically reviewed the yearbook for appropriateness and tastefulness and this had been communicated to plaintiff, the standard was too vague to form the basis for regulation of speech in a public forum such as a yearbook. *Id.* at 1573-74. Like other student speech actions seeking injunctive relief on behalf of students close to graduation, this case never progressed beyond the district court level.

¹¹ Although the court also referred to school board policies as supporting its "public forum" conclusion, the substance of those policies is not set out in the opinion. 429 F.Supp. at 735.

In *San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986), a divided Ninth Circuit panel held that a school district had unconstitutionally barred antidraft advertisements from five school-sponsored high school newspapers, which the court found to be "public forums." Judge Wallace dissented, arguing that the majority's position was inconsistent with *Cornelius* and *Perry*. He noted that written board policy specifically provided that paid advertisements shall not be published except "[i]nsofar as the publication staff and advisor in their sole discretion determine that the publication of such material will further the publication's primary purposes sufficiently to warrant publication."¹² *Id.* at 1483-84.

The analysis in these cases, like that of the Eighth Circuit, bears little resemblance to *Cornelius* or *Perry* — indeed, the Eighth Circuit did not cite either case. The courts do not ask whether the paper is open to indiscriminate use by the general public, the student body or student staff. They essentially adopt a "wide variety of topics" test and give no weight to the selective access and screening procedures established by school board regulations or inherent in faculty supervision. While the "appropriateness" access standard identified the Combined Federal Campaign in *Cornelius* as a nonpublic forum, it is dismissed as too vague to be constitutionally meaningfully in *Stanton*. Yet, as this Court recently noted, "[t]he determination of what manner of speech in the classroom or in school

¹² See also *Searcey v. Crim*, 642 F.Supp. 313 (N.D.Ga. 1986) (Atlanta public schools created public forums by permitting outside organizations, including military recruiters, to place literature in guidance offices and participate in "career days"; therefore must grant equivalent access to "peace activists"); *Clergy and Laity Concerned v. Chicago Board of Education*, 586 F.Supp. 1408 (N.D.Ill. 1984) (same); *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969) (school-sponsored newspaper, which published controversial news items, constitutionally required to accept antiwar advertisement despite regulation banning noncommercial advertisements).

assembly is inappropriate properly rests with the school board.” *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986).

Indeed, there is so much confusion about the status of school-sponsored newspapers under the public forum doctrine that the panel majority in *Governing Board*, 790 F.2d at 1476, can conclude school newspapers are virtually always public forums in part because they “are devoted entirely to expressive activity,” while the United States District Court for the District of Nebraska, relying on the same precedents, can hold that school-sponsored newspapers are virtually never public forums because editorial discretion necessarily means selective access. For the latter court, a newspaper is not a “public forum” unless it accepts “proffered material as a matter of course.” *Sinn v. Daily Nebraskan*, 638 F.Supp. 143, 151 (D.Neb. 1986), *appeal pending* No. 86-1927-NE (8th Cir., filed July 14, 1986). Both cases involve rejection of advertisements.¹³

An approach very different from that of the Eighth Circuit is evident in *Student Coalition for Peace (SCP) v. Lower Merion School District Board*, 776 F.2d 431 (3d Cir. 1985). In that case SCP, a non-school sponsored student organization advocating nuclear disarmament, requested use of the athletic field for a “Peace Fair.” The field was routinely used for nonschool-sponsored community events, including Memorial Day services. The Third Circuit, relying on *Perry* and *Cornelius*, concluded that the field was not a public forum, because school board policy stated that school facilities, including the field, were

¹³ Nor it is apparent whether there is any constitutional distinction between decisions to bar publication made by student editors of school-sponsored publications and those made by teachers or school administrators. The *Gambino* court suggested that decisions by student editors do not constitute state action. 429 F.Supp. at 735. The *Stanton* court held they did, at least as long as a school official “ratified” or “concurred” in the decision. 577 F.Supp. at 1571.

available to community groups “for appropriate purposes” and SCP had not shown permission was granted as a matter of course.

The Third Circuit has also been more solicitous to the school board’s authority to control curriculum. In an opinion that does not refer to either public forum analysis or *Tinker’s* “material disruption” standard, the Third Circuit held that a school superintendent’s decision to cancel a high school play because of its sexual theme did not violate the students’ First Amendment rights. *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981). The “critical factor” was the district court’s finding that “[p]articipation in the play, though voluntary, was considered a part of the curriculum in the theatre arts.” *Id.* at 216.¹⁴ The United States District Court for Vermont also recently upheld a school board’s decision to cancel a high school play as “inappropriate” relying in part on Judge Nangle’s opinion. It found the right of free expression must give way to the school board’s responsibility for their students’ physical and psychological well-being. *Bell v. U-32 Board of Education*, 630 F.Supp. 939, 945 (D.Vt. 1986).

Spectrum has many more indicia of a curricular activity than *Seyfried’s* play — *Spectrum* is an activity of a class under the supervision of a teacher for which the students receive a grade and academic credit.¹⁵ In contrast to *Seyfried’s* sensitivity to a

¹⁴ *Cf. Bender v. Williamsport Area School District*, 741 F.2d 538, 549 (3d Cir. 1984) (“no indication, nor indeed any contention made, that the activity period is tied to the formal curriculum of the school”), *vacated*, 106 S.Ct. 1326 (1986) (on standing grounds).

¹⁵ Even the Ninth Circuit in *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356 (9th Cir. 1985), *rev’d*, 106 S.Ct. 3159 (1986), acknowledged “that school officials had much greater latitude in reviewing a student publication that was part of the curriculum than in the case of a student newspaper that was an extra-curricular activity.” *Id.* at 1364. It distinguished *Seyfried* on the ground that *Fraser’s* speech was extracurricular while *Seyfried’s* play was a part of the curriculum.

school's legitimate interest in avoiding the impression that it endorsed the sexual norms portrayed in the play, 668 F.2d at 216, the Eighth Circuit cryptically dismissed Petitioners' similar concerns with the observation that a school-sponsored newspaper was something "akin to the school library" and "cannot be construed objectively as an integral part of the curriculum." (App. A-12, quoting *Gambino*, 429 F.Supp. at 736).

The role of public forum analysis and the curricular/noncurricular distinction in secondary school student speech cases has been further clouded by this Court's opinion in *Bethel School Dist. No. 403 v. Fraser*, 106 S.Ct. 3159 (1986). In that case the Court reviewed the authority of school officials to regulate expression within a school assembly. It did not analyze whether the assembly was a "public forum," raising questions whether that analysis is even applicable in cases such as *Gambino*, *Stanton* and the instant case, where the issue is not access *vel non*, but the form or type of expression that may be engaged in by those who have access. It also prompts doubts whether public forum analysis is pertinent in cases where the forum is clearly not open to the "public at large." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-81 (1984); see *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986). The *Fraser* Court emphasized the school sponsorship of the student assembly and its relationship to the curriculum, but did not articulate the particular significance of these factors in its analysis. *Fraser*, therefore, casts a shadow on the legitimacy of the Eighth Circuit's approach, but it does not define the proper one.

IV.

Regardless of the applicability of the public forum doctrine, there remains the question of what First Amendment standard governs. There is no agreement among those courts that have identified secondary school "public forums": the Ninth Circuit has applied the "compelling governmental interest" standard,

Governing Board, 790 F.2d at 1478, the Eighth Circuit the "somewhat lower" *Tinker* standard (App. A-10), and the Fourth Circuit has treated the public forum determination as a necessary condition to any First Amendment protection, *Gambino*, 429 F.Supp. at 734, *aff'd*, 564 F.2d 157 (4th Cir. 1977). The *Tinker* Court held that the First Amendment does not immunize speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. But to invoke this standard clarifies nothing. Dramatically different interpretations of *Tinker* are evident throughout the secondary school expression cases.¹⁶ It is arguable whether the Eighth Circuit's interpretation is in fact distinguishable from the "compelling governmental interest" standard.¹⁷ For example, the court cautions that "if student writings are to be censored prior to publication, the least restrictive means are to be followed." (App. A-11 n. 5). It affords no discernible deference to the judgment of school authorities.

¹⁶ Some courts of appeals have interpreted *Tinker* to create a heavy presumption against prior restraint of student expression. See, e.g., *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975). Others show substantial deference to the judgment of school officials. See, e.g., *Eisner v. Stamford Board of Education*, 440 F.2d 803, 808 (2d Cir. 1971). In *Eisner* the Second Circuit read *Tinker* to require that school officials demonstrate only a "reasonable basis for interference with student speech." *Id.* at 810. On the other hand, the Seventh Circuit has taken the position that any prepublication review requirement in secondary schools is unconstitutional. *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). *Fujishima* specifically rejected *Eisner* as "unsound constitutional law," and interpreted *Tinker* as only authorizing post-publication discipline. *Id.* at 1358-59. "In sum, the circuits are split on what type of student speech a school may constitutionally regulate, whether prior restraints on student speech are permissible, and ultimately on what criteria should be used to determine when administrative regulation of student speech is constitutionally permissible." Note, *supra* note 6, at 629.

¹⁷ See Note, *supra* note 6, at 626, 637 (suggesting *Tinker* stems from judicial recognition of "a compelling state interest in insuring orderly schools").

This is most evident in its interpretation of *Tinker's* reference to "invasion of the rights of others" and its rejection of the Second Circuit's *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978).

In *Trachtman* a divided Second Circuit panel held that New York City public school officials had not violated the rights of the student staff of a high school newspaper by prohibiting distribution of a sex questionnaire to high school students. The student staff intended to publish the results. The school officials contended that the survey, which was to be both anonymous and voluntary, would "solicit a response that will invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm." *Id.* at 516. The court of appeals held that the school officials had demonstrated a "rational basis" for their conclusion that distribution of the questionnaire would result in significant harm to some students. See also *Frasca v. Andrews*, 463 F.Supp. 1043 (E.D.N.Y. 1979).

The Eighth Circuit explicitly rejected *Trachtman* as stating a position that prevailed "over a convincing dissent." (App. A-13). It elected instead to take its lead from a law review note that criticizes *Trachtman* as unduly deferential to school authorities. The author suggests, and the Eighth Circuit agreed, that the only legitimate purpose of the "invasion of rights of others" language in *Tinker* is to allow a school district to avoid tort liability.¹⁸ Therefore, schools can constitutionally limit student speech to prevent invasion of rights of others "only when publication of that speech could result in tort liability for the school." (App. A-14).

The Eighth Circuit has grossly misread *Tinker*. By speaking of the "rights of others" in a case involving privately initiated, nonschool-sponsored expression, the *Tinker* Court recognized

¹⁸ Note, *supra* note 6, at 640-41.

that school officials must have substantial latitude *to protect their students* — as opposed to merely protect themselves or the coffer of their school district. In *Fraser* this Court noted that Fraser's "speech could well be seriously damaging to its less mature audience." 106 S.Ct. at 3165. It did not speculate whether any members of that audience had a cause of action against the school.

Underlying the analytical differences between this case and *Trachtman* are polar views on the deference to be afforded professional educators and their judgments about what is best for high school students. The Second Circuit cautioned that "it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students." *Trachtman*, 563 F.2d at 519. In contrast the Eighth Circuit dismissed Petitioners' argument that the pregnancy profiles were inappropriate subjects for a school-sponsored newspaper, given the age and immaturity of the readership, with the observation that high school students are aware of the teenage pregnancy problem "and it is most unlikely that anything in the articles would offend their sensibilities." (App. A-13). It dispelled similar concerns about the "Divorce's Impact" article with the observation that "statistics reveal that a significant number of high school students have grown up in single parent homes due to divorce." (App. A-14). As for Petitioners' concerns about the pregnant students' privacy and potential loss of anonymity, it was enough that the students gave their consent — regardless of their age or level of maturity. (App. A-15). Yet "[p]art of the educational process is to learn in a protected environment where one's mistakes do not have damaging or irrevocable consequences." *Frasca v. Andrews*, 463 F.Supp. 1043, 1052 (E.D.N.Y. 1979). As Judge Wollman concluded in dissent,

It may be that the defendant school officials acted out of a too abundant sense of caution. We judges are not journalists, however, and even less school administrators.

Granting the defendant school officials the deference due them, I would hold that they committed no constitutional violation in declining to publish the articles in question.

(App. A-20).

V.

The Eighth Circuit has placed the school principal and journalism teacher in the untenable position of having to make highly technical and potentially costly legal judgments about tort liability and the limits of First Amendment protection. The author of the law review note relied on by the Eighth Circuit recommends that to make the tort liability standard workable, any decision to suppress publication be subject to immediate review by "independent" counsel and then prompt judicial review.¹⁹ In a period of budgetary constraint, high legal fees, and unaffordable — indeed often unavailable — insurance, a school district confronted with the Eighth Circuit's opinion may well forego the sponsorship of student publications rather than risk additional financial and legal exposure they cannot otherwise control. Thus, the irony of the Eighth Circuit's opinion is that it invites elimination of the very avenues for expression it sought to enhance and discourages public schools from actively encouraging and preparing students, through school-sponsored publications, to seek careers in journalism. The final testimonial to *Tinker's* confused legacy is that some lower courts suggest that even this withdrawal option is constitutionally foreclosed to the school board.²⁰

¹⁹ Note *supra* note 6, at 643 & n.106, 650-55.

²⁰ See *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Reineke v. Cobb County School District*, 484 F.Supp. 1252, 1261 (N.D.Ga. 1980).

CONCLUSION

Whether viewed from the perspective of the public forum doctrine or *Tinker*, we submit the district court applied the appropriate standard — reasonableness. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (applying reasonableness standard in Fourth Amendment context). It is of utmost importance to our nation's school districts that they receive definitive guidance from this Court on the extent of their ability to regulate expression in school-sponsored publications that are "part of the school curriculum." In light of the significance of this issue, and the pronounced conflicts among the circuits in dealing with it, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-1614

Cathy Kuhlmeier; Leslie Smart;
Lee Ann Tippet,
Appellants,

vs.

Hazelwood School District, Charles Sweeney;
Joseph Donahue; Gwen Gerhardt;
August Busch, Jr.; Ann Gibbson;
James Arnac; Dr. Thomas Lawson;
Robert Eugene Reynolds; Howard Emerson;
Dr. Francis Huss,
Appellees.

Student Press Law Center and
Journalism Education Association,
Amici curiae
for appellants

St. Louis Globe-Democrat, Inc.,
Amicus curiae.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 16, 1986

Filed: July 7, 1986

Before HEANEY, ARNOLD, and WOLLMAN, Circuit Judges.

HEANEY, Circuit Judge.

The issue in this appeal is whether administrators of Hazelwood East High School violated the first amendment rights of the student staff of the school newspaper, *Spectrum*, by deleting two full pages of the May 13, 1983, edition because they objected to the content of two of the articles on these pages. We hold that *Spectrum* is a public forum for the expression of student opinion and that the two articles objected to by the administrators could not reasonably have been forecast to materially disrupt classwork, give rise to substantial disorder, or invade the rights of others. Accordingly, we hold that the deletion of the two pages violated the first amendment rights of the student staff. We reverse and remand to the district court with directions to determine whether nominal damages should be awarded to the plaintiffs and, if so, the amount.

BACKGROUND

Appellants are three former Hazelwood East High School students who were staff members of *Spectrum*. Appellees are the Hazelwood School District, the Hazelwood school principal, the school superintendent, and the assistant superintendent.

Spectrum is the school newspaper at Hazelwood East. Produced by the *Journalism II* class, it is published eight to ten times each year. Student staff members determine the content and layout of the paper. During the spring semester of the 1982-83 school year, Robert Stergos taught *Journalism II* and served as *Spectrum*'s faculty advisor. Although Stergos exercised minimal editorial control, he submitted each issue of Spec-

trum to Principal Robert Reynolds for prepublication review. Stergos approved of the articles to be published in the May 13, 1983 edition, in near final form, before he left the school district's employ on April 29, 1983.

Stergos' replacement, Howard Emerson, took the laid-out May 13 edition of *Spectrum* to the printers on May 6, 1983. He received the proofs back on May 10, and delivered them to Reynolds for approval. Reynolds directed Emerson to delete two full pages containing five articles, only two of which he found objectionable.¹ Reynolds objected to one story which chronicled three Hazelwood East students' experiences with pregnancy, and another which discussed the impact of divorce on children. Reynolds gave Emerson no reason for the deletions.

Although pseudonyms were used for the girls in the pregnancy study, Reynolds subsequently testified that he thought they could be identified from the text. He was concerned with the divorce article because one student was named and gave reasons for her parents' divorce. He thought this inappropriate for publication because the parents had not consented, and were not given an opportunity to respond. Reynolds was unaware of the fact that Emerson had deleted the student's name from the copy of the article which was to be sent to the printer.

Reynolds did not inform the student authors of his decision; they learned of the deletions when the paper was released on May 13, 1983. They met with Reynolds that afternoon to discuss the deletions, and Reynolds told them the stories were inappropriate, personal, sensitive, and unsuitable. The students subsequently xeroxed the articles and distributed them to other

¹ The three other articles discussed runaways, teen pregnancy generally, and the "squeal law." They were removed only because they were on the same pages as the allegedly objectionable articles.

students on the school premises. They were not punished for that act.²

On August 19, 1983, three *Spectrum* staff members filed this first amendment action seeking injunctive relief, money damages, and a declaration that their first amendment rights were violated. The district court denied injunctive relief and held that the students' first amendment rights were not violated.

On appeal, appellants contend that the district erred in 1) determining that *Spectrum* was not a public forum, 2) determining that the district's censorship did not violate the students' first amendment rights, 3) refusing to invalidate the district's policies and regulations regarding student expression, and 4) denying them their right to a jury trial.

DISCUSSION

I.

The starting point for any analysis of the first amendment rights of high school students is *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). There, the Court held a high school regulation prohibiting students from wearing black armbands in protest of the Vietnam War violated the first amendment. *Tinker*, 393 U.S. at 506. The Court reasoned that secondary students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Id.* at 506. Those rights are not absolute, however, and must be "applied in light of the special circumstances of the school environment." *Id.* at 506. Nevertheless, though the first amendment rights of students are not co-extensive with those of adults, student expression may be curtailed only when it "materially disrupts classwork or in-

² This point emphasizes that the controversy over the articles served only to ensure that the offending articles were secured and widely read.

volves substantial disorder or invasion of the rights of others." *Id.* at 513; see *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena*, 363 F.2d 749 (5th Cir. 1966).

Here, the district court concluded that in the context of a high school newspaper case, the *Tinker* test applies only to papers which are public forums. A standard more deferential to the interests of school officials is applied where the newspaper is an integral part of the school curriculum. The court found that *Spectrum* fell in the latter category because:

[1] *Spectrum* was produced by members of the Journalism II class, which class was taught by a faculty member according to the Hazelwood East curriculum guide. * * * [2] a textbook was used in the class, and a grade and academic credit was awarded for completion of the class. * * * [3] The curriculum guide of Hazelwood East described the Journalism II class as a "laboratory situation", and *Spectrum* was the laboratory exercise. * * * [4] *Spectrum's* staff was essentially restricted to students in the journalism class, said class met regularly in a classroom to work on *Spectrum*, and the nature of the out-of-class work required for *Spectrum* was not substantially greater than that required in other courses taught at Hazelwood East. * * * [5] Board Policy 348.51 stated that school-sponsored publications, of which *Spectrum* was one, were "developed within the adopted curriculum". * * * [6] The amount of extra-duty pay received by Mr. Stergos does not indicate that his services in connection with *Spectrum* were in the nature of an extracurricular activity. * * * [7] [T]he nature and extent of the * * * teacher's control * * * with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by [others] Hazelwood officials in the past [.] * * * That control was not exercised to any lesser extent with respect to the articles in question.

We disagree with the district court and hold that *Spectrum* is a public forum because it was intended to be and operated as a

conduit for student viewpoint. Although *Spectrum* was produced by the *Journalism II* class, it was a "student publication" in every sense. The students chose the staff members, determined the articles to be written and printed, and determined the content of those articles. As advisor Stergos testified: "It's a student paper, so that the students, first of all, decided the stories, and, you know, wrote the stories, so they obviously were deciding the content. They were writing them. I would help if there were any matters that they had questions of, legalwise or ethicalwise, but—."

Spectrum covered topics of general interest to the student body. Since 1976, it had published stories dealing with teenage dating, students' use of drugs and alcohol, the desegregation of the St. Louis schools, religions, cults, and runaways. With over 4,500 copies being sold in the 1982-83 school year (\$1,166.84 in sales at \$.25 a copy), the newspaper was distributed to both the school and to the public. Additionally, at the beginning of each school year, *Spectrum* published a policy statement,¹ announcing that it was a student newspaper, that its publication policy would be guided by the first amendment, that the articles and editorials reflected the view of the staff and not the ad-

¹ SPECTRUM

Statement of Policy

Spectrum is a school funded newspaper; written, edited, and designed by members of the *Journalism II* class with assistance of adviser Mr. Robert Stergos.

Spectrum follows journalism guidelines that are set by Scholastic Journalism textbook * * *. The newspaper will not attack any individual. However, any group, organization or club may be subject to examination and/or criticism.

All non-by-lined editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East. All by-lined editorials reflect only the opinions of the writer.

Spectrum welcomes all student, faculty and community input, including suggestions, story ideas, news tips, and letters-to-the-

ministrators or faculty of the high school, and that it followed the standards set forth in the journalism class textbook.⁴

editors. * * * *Spectrum* staff will not edit any letters, but all letters may be subject to condensing if there is a space limitation. A letter will not be printed if it is libelous, obscene, or against the general policy of the newspaper.

Spectrum will be published approximately every three weeks. It will be sold during the school day for the price of 25 cents.

* * * *

Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: "Congress shall make no law restricting * * * or abridging the freedom of speech or the press * * *."

That this right extends to high school students was clarified in the *Tinker vs. Des Moines Community School District* case in 1969.

⁴ This textbook provided:

I. Rights and Responsibilities of the Student Press.

A. Student press has essentially the same rights and responsibilities as the mass media.

B. Neither "students nor teacher shed their constitutional rights to freedom of speech or expression at the school house gate"—from *TINKER vs. DES MOINES COMMUNITY SCHOOL DISTRICT* (1969).

* * * *

C. " * * * undifferentiated fear or apprehension of disturbance (in schools) is not enough to overcome the right of freedom of expression."—from *TINKER*.

D. Student conduct or speech must "materially and substantially interfere with the requirements of appropriate discipline" to be found unacceptable.

* * * *

Moreover, in the January 14, 1980 issue of *Spectrum*, a non-by-lined editorial was printed entitled "The Right to Write." This editorial described *Spectrum* as follows:

Because *Spectrum* is a member of the press and especially because *Spectrum* is the sole press of the student body, *Spectrum* has a responsibility to that student body to be fair and unbiased in reporting, to point out injustice and, thereby, guard student freedoms, and to uphold a high level of journalistic excellence. This may, at times, cause *Spectrum* to be unpopular with some. *Spectrum* is not printed to be popular. *Spectrum* is printed to inform, entertain, guide and serve the student body — no more, and hopefully, no less,

And, Board Policy 348.5, entitled "Student Publications" provided: "Students are entitled to express in writing their personal opinions." A second board policy, Board Policy 348.51 provided: "School sponsored student publications will not restrict

F. Prior restraint versus subsequent punishment becomes an important distinction.

1. The "forecast" rule is not a basis for prior restraint or censorship.

2. Fear of school disruption is not a reason or excuse for establishing a system of censorship.

3. "Forecast" rule is a formula for determining when students may be punished after publication of disputed material.

4. Students face subsequent punishment through legal action in areas of libel, invasion of privacy, and obscenity, as do all journalists.

5. Requirements of school discipline may justify punishment for speech that does disrupt school activities.

School authorities have the power to enforce reasonable regulations as to time, place, and manner of speech and its distribution.

free expression or diverse viewpoints within the rules of responsible journalism." A third board policy, No. 341.5, entitled "Controversial Issues," provided:

[S]tudent[s] shall have rights * * * .

* * * *

a. * * * to study any controversial issue which has political, economic, or social significance, and concerning which (at his/her level) he/she should begin to have an opinion.

b. * * * to have access to all relevant information, including the materials which circulate freely in the community.

c. * * * to study under competent instruction in an atmosphere free from prejudice and bias.

d. * * * to form and express one's own opinions on the controversial issues without, thereby, jeopardizing the relationship with the teacher or with the school.

Although, as the district court noted, *Spectrum* was produced by members of the *Journalism II* class, its staff was essentially restricted to students of that class and *Spectrum* was a part of the school adopted curriculum, it was something more. It was a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so. *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Our conclusion that *Spectrum* is not a curricula paper but rather a public forum is supported by numerous courts.

In *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977), a high school newspaper, produced by students in a journalism class, was deemed a free speech forum: "[T]his instrument was conceived, established, and operated as a conduit for student expression on a wide variety of topics. It falls clearly within the parameters of the First Amendment." *Gambino*, 429 F. Supp. at 735.

In *Fraser v. Bethel School District No. 403*, 755 F.2d 1356 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 56 (Oct. 7, 1985), a school-sponsored assembly was not part of the curriculum: "The assembly was in the best sense a student activity; the candidates and their nominators were on their own, free to exercise their individual judgments about the content of their speeches." *Fraser*, 755 F.2d at 1364. See *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D. N.Y.), *aff'd without opinion*, 515 F.2d 504 (2nd Cir. 1975); *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Given that *Spectrum* is a public forum entitled to some first amendment protection, the question then is the extent of this protection. Although generally, a content based prohibition on speech in a public forum must be narrowly drawn to effectuate a compelling state interest, *Widmar v. Vincent*, 454 U.S. 263, 270 (1981), the standard is somewhat lower in the context of a high school. In that setting, in order for a prohibition on protected speech to be adjudged valid, school officials must demonstrate that the prohibition was "necessary to avoid material and substantial interference with school work or discipline * * * or the rights of others." *Tinker*, 393 U.S. at 511; *Nicholson v. Board of Education*, 682 F.2d 858, 863 n.3 (9th Cir. 1982); *Trujillo v. Love*, 322 F. Supp. at 1266, 1270 (D. Col. 1971). See also *Bender v. Williamsport*, 741 F.2d 538, 547 (3rd Cir. 1984) (opportunity of high school student to exercise rights in public forum not co-extensive with rights of adults). Thus, the inquiry here is whether Hazelwood East officials have demonstrated

facts which would have led them to reasonably forecast that the publication of two pages of the May 13th edition of *Spectrum* would have materially disrupted classwork, given rise to substantial disorder, or invaded the rights of others.³

The district court enumerated several justifications for the censorship here.

1) Principal Reynolds' belief that publication could not be delayed;

2) The defendants' expert's belief that publication of the pregnancy case study would create the impression that the school endorses the sexual norms of the girls in the article;

3) The judgment of school officials that the pregnancy case study was not appropriate, given the age and maturity of some of its readers.

4) Reynolds' belief that the pregnant girls' anonymity would be lost and thus the story invaded the privacy of the girls, the fathers, and the parents of both;

³ The students argue that because *Tinker* is a punishment case, it does not authorize administrators to exercise prior restraint. Support for this view lies not only in the textbook used by the students (*supra* note 4), but in established case law. *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1971). We think the better view, however, is that the *Tinker* standards are to be applied whenever administrators can reasonably predict that the content of a student publication will violate the *Tinker* standard. *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); see also *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982); *Riseman v. School Comm.* 439 F.2d 148 (1st Cir. 1971); Note, *Administrative Regulation of the High School Press*, 83 Mich. L. Rev. 625, 635 (1984). Of course, if student writings are to be censored prior to publication, the least restrictive means are to be followed.

5) The belief of Reynolds and the defendants' expert that the divorce article should not be printed because one student was identified and her parents were not given the opportunity to respond.

We find that none of these reasons justify the censorship.

First, we observe there is no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school. Indeed, there is no claim made on appeal that such was the case.

Second, it is clear that the administrators' claimed inability to delay publication did not justify censoring two full pages of the May 13th issue when at most only two articles on those pages were objectionable. The apparent reason for this was administrative convenience. It is clear from the record that there was no specific timetable for publication of that or any other issue, thus the principal could have delayed publication long enough to seek student concurrence to the changes he proposed. Also, the school has cited no reason why it couldn't publish the deleted pages with only the allegedly objectionable articles excised.

Third, there is no evidence in this record which supports the administrators' fear that the pregnancy case study would create the impression that the school endorsed the sexual norms of the students interviewed. "A corollary of the finding that [*Spectrum*] was established as a vehicle for First Amendment expression and not as an official publication is that the newspaper cannot be construed objectively as an integral part of the curriculum offered at [Hazelwood East]. * * * Rather it occupies a position more akin to the school library[.] * * * [Thus] the material is not suppressible by reason of its objectionability to the sensibilities of the [administrators]." *Gambino v. Fairfax County School Board*, 429 F. Supp. 731, 736 (E.D. Va.), *aff'd*,

564 F.2d 157 (4th Cir. 1977). Nor is there evidence in this record to support the administrators' view that the article was inappropriate for publication in *Spectrum*, given the age and immaturity of some of its readers. Unfortunately teenage pregnancy is a problem in nearly every high school in the United States, including Hazelwood East. The students in the high school, including the freshmen and sophomores, are aware of the problem, and it is most unlikely that anything in the articles would offend their sensibilities. See *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972).

We are left then with the heart of this case: whether the principal justifiably censored the divorce story because it identified one freshman, and the pregnancy case study because it allegedly invaded the privacy of the fathers and the pregnant girls' parents.

We must first determine what the *Tinker* Court meant by "invasion of the rights of others."

The *Tinker* Court took the language for this test from *Blackwell v. Issaquena*, 363 F.2d 749 (5th Cir. 1966) where students distributed buttons to their peers, in part by accosting unwilling wearers on school grounds and pinning the buttons to them. The *Blackwell* Court upheld a school regulation forbidding students to wear the buttons in light of the "commotion, boisterous conduct, [and] collision with the rights of others" involved in the distribution of the buttons. *Blackwell*, 363 F.2d at 754.

Very few courts have defined the parameters of "invasion of the rights of others." The Second Circuit held, over a convincing dissent, that the distribution to students of a sex questionnaire invaded the rights of others. *Trachtman v. Anker*, 563 F.2d 512 (2nd Cir. 1977). At least one law review article suggests, however, that "invasion of the rights of others" must refer only to a tortious act. Note, *Administrative Regulation of the High School Press*, 83 Mich. L. Rev. 625, 640 (1984).

“Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression.” *Id.* at 641. We are persuaded by this analysis and agree that school officials are justified in limiting student speech, under this standard, only when publication of that speech could result in tort liability for the school. Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.

We can deal rather summarily with the divorce article because the testimony in the record is that Emerson, the faculty advisor, had deleted the student’s name in the proofs that were to be returned to the printer. Thus, the story was nothing more than an anecdotal treatment of the subject of divorce. The three students questioned were each advised that their answers would be used in a newspaper article, but that their names would not be revealed. The author obtained the consent of all subjects quoted in her article, even where their names were not used. The article included quotes from a student identified only as “Junior.” “My dad didn’t make any money, so my mother divorced him,” and “[m]y father was an alcoholic and he always came home drunk and my mom really couldn’t stand it any longer.” The named student provided this quote: “My dad wasn’t spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything.” “In the beginning I thought I caused the problem, but now I realized it wasn’t me,” added the student.

Underlying the deletion is the school district’s feeling that these articles were inappropriate for high school students because: “divorce is pre se an inappropriate subject for high school newspapers.” Unfortunately, statistics reveal that a significant number of high school students have grown up in single parent homes due to divorce. Thus, a responsible treat-

ment of this subject in the high school newspaper would not be shocking, or even new—it would be an outside and perhaps helpful, perspective on a well-known subject.

The pregnancy article detailed the anonymous accounts of three Hazelwood East girls who became pregnant, but school officials feared the girls would nevertheless be identified. And while the three students questioned agreed to being the subjects of a newspaper story, their boyfriends and parents did not.

On these facts, the only tort action which, conceivably, could have been maintained against Hazelwood East had the pregnancy case study been published is that of invasion of privacy. This tort includes “publicity, of a highly objectionable kind, given to private information about the plaintiff even though it is true and no action would lie for defamation.” W. Prosser & Keaton, *The Law of Torts* 809 (4th Ed. 1971). The American Bar Association’s Juvenile Justice Standards Project Relating to Schools and Education would permit restriction of student expression that “is violative of another person’s right of privacy by publicity exposing details of such person’s life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities * * *.” American Bar Assn., *Standards Relating to Schools and Education* 84 (1982). Certainly the parents of the girls could not maintain this tort against the school because the article did not expose any details of the parents’ lives, only about the students, and they fully consented. Almost as inconceivable is the prospect of the fathers maintaining this tort action. The fathers were not named in the article, thus they could only be identified by persons who previously had knowledge of the revealed facts. Thus, there would have been no disclosure. We conclude that because no tort action based on the articles could have been maintained against Hazelwood East, schools officials were not justified in censoring the two articles based on the *Tinker* “invasion of the rights of others” test.

Finally, we are asked to remand this matter to the district court for determination of damages. After a review of the record, we are thoroughly convinced that the facts here would not, under any circumstances, give rise to anything other than nominal damages. We thus remand to the district court with directions to determine the amount, if any, of damages. Appellants may, within thirty days, make an appropriate motion to this Court for an allowance of attorneys' fees on appeal. The appellee will then have fifteen days to respond to the application. On remand, the district court will, after, application and hearing, determine the appropriate fee to be allowed to appellants at the district court level.

II.

We now turn to the question regarding the regulations which govern *Spectrum's* content. Appellants seek a declaration that Hazelwood School Board Policies Nos. 348.5,⁶ 348.51,⁷ and

⁶ Hazelwood School Board Policy No. 348.5, entitled "Student Publications," states:

a. Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors.

b. Students who edit, publish or distribute hand-written, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications.

c. Libel, obscenity, and personal attacks are prohibited in all publications.

d. Unauthorized commercial solicitation will not be allowed on school property at any time. An exception to this rule will be the sale of non-school sponsored student newspapers published by students of the District at times and in places as designated by school authorities.

⁷ Hazelwood School Board Policy No. 348.51, entitled "School Sponsored Publications," states:

School sponsored publications will not restrict free expression or

Principal Reynolds's oral directive that each issue of *Spectrum* be submitted to him for review prior to publication, are constitutionally invalid. Specifically, appellants claim that these regulations are constitutionally infirm because: 1) they do not adequately apprise students with sufficient definitions, as to what expression can and cannot be printed; 2) they do not provide specific criteria with which to judge student expression; and 3) they do not delineate an adequate and prompt appeals procedure. In substance, the students ask us to rewrite the regulations for the board of education. This we decline to do. We believe that the board of education and the school administrators will make such adjustments to the regulations necessary to comport with the constitutional standards outlined in this opinion.

In the event that school administrators censor student writings on the basis of *Tinker*, they are obligated to give the students an early opportunity to alter the materials to conform

diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

a. All material must be signed.

b. The material will be evaluated by an editorial review board of students from the publication classes.

c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers, and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final.

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the education process.

with the appropriate standards. See Note, *Administrative Regulation of the High School Press*, *supra* at 647. Moreover, if the students challenge the right of the administrator to limit student speech, the burden is on the school administrators to justify their actions under the *Tinker* standard. *Shanley v. Northeast Independent School District*, 462 F.2d 960, 970 (5th Cir. 1972); *Reineke v. Cobb County School District*, 484 F. Supp. 1252, 1257 (N.D. Ga. 1980).

III.

We now turn to the jury trial question. Finding "the factual disputes * * * inextricably intertwined with the central legal issues," the district court determined that the declaratory relief and liability questions should be heard by the court sitting without a jury. Accordingly, it bifurcated these issues from the issue of damages. Appellants claim that they were unconstitutionally denied their right to a jury trial on the issues of whether *Spectrum* was a public forum and whether the controversial articles would have materially disrupted school discipline on the grounds that these were issues of fact and not questions of law.

We have already held that *Spectrum* was a public forum and that there is no substantial evidence that the articles in question would have materially disrupted school discipline. These holdings favor plaintiffs' positions on both issues. It is therefore unnecessary to pursue the question whether the district court erred in denying a jury trial on these very questions. A holding one way or the other on the jury-trial point would have no effect on the outcome of the case. It would be an advisory opinion only, and such opinions are to be avoided. *Cf. National Football League v. McBee & Bruno's, Inc.*, No. 84-2665 (8th Cir. June 4, 1986), slip op. 5 n.4 (question whether trial by jury should have afforded on claim for damages under the Copyright Act not reached, because no damages were awarded).

Accordingly, we express no view on the jury-trial issue tendered by appellants.

WOLLMAN, Circuit Judge, dissenting.

The district court found that *Spectrum* was a school-sponsored, faculty-supervised, integral part of the school's journalism curriculum. This finding amply supports the district court's conclusion that *Spectrum* was not a public forum. That *Spectrum* may have constituted a vehicle for the expression of student viewpoints was incidental to its primary purpose of giving students a hands-on opportunity to put their theory into practice.

Having incorporated into the curriculum a newspaper for the purpose of giving students an opportunity to develop the skills and knowledge imparted in the journalism courses of which the newspaper is an integral part, may school officials constitutionally decline to publish certain articles for fear of the consequences those articles may engender? For the reasons set forth in *Seyfried v. Walton*, 668 F.2d 214 (3rd Cir. 1981), I would hold that they may. True, in *Seyfried* it was the production of a school play having graphic sexual content that school officials halted rather than publication of a newspaper article, but that distinction is not critical in view of the court's emphasis on the fact that the play was an integral part of the school's educational program and that participation in the play "was considered a part of the curriculum in the theater arts." 668 F.2d at 216. In this regard, we should note that even those who give broadest scope to the authority of the courts to review the decisions of school boards pause when matters of curriculum are concerned. See *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 869 (1982). Likewise should we.

Students' first amendment rights of personal expression, as spelled out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), should not be held to give rise to a collective first amendment right to publish a school-sponsored, faculty-supervised newspaper with the same lack of

constraints enjoyed by the commercial press or, for that matter, a solely student-sponsored, extracurricular paper totally removed from the aegis of the school. A contrary holding, as exemplified by the majority opinion, pits students against school officials in a battle for control over what is rightfully within the province of school officials. See *Pico*, 457 U.S. at 885 (Burger, C.J., dissenting); at 894 (Powell, J. dissenting).

The majority opinion consigns school officials to chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material. Although the commercial press can well afford to retain counsel to advise them daily on questions of possible liability, not many school districts possess similar resources.

It may be that the defendant school officials acted out of a too abundant sense of caution. We judges are not journalists, however, and even less school administrators. Granting the defendant school officials the deference due them, I would hold that they committed no constitutional violation in declining to publish the articles in question.

I would affirm the district court's judgment.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-1614-EM

Cathy Kuhlmeier, et al.,

Appellants,

vs.

Hazelwood School District, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges Ross, Fagg, Bowman and Magill would have granted the petition.

Petitions for rehearing filed by appellants and appellees are also denied.

August 27, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2039C(1)

Cathy Kuhlmeier, et al.,
Plaintiffs,

vs.

Hazelwood School District, et al.,
Defendants.

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants did not violate plaintiffs' first amendment rights when they deleted several articles from the May 13, 1983 issue of *Spectrum*, the official school-sponsored newspaper of Hazelwood East High School. Accordingly, judgment is entered for defendants on plaintiffs' complaint.

/s/ John F. Nangle
United States District Judge

Dated: May 9, 1985

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2039C(1)

Cathy Kuhlmeier, et al.,
Plaintiffs,

vs.

Hazelwood School District, et al.,
Defendants.

MEMORANDUM

This is a civil rights action for declaratory relief and damages arising from defendants' refusal to permit publication of certain articles in the May 13, 1983, issue of *Spectrum*, a school newspaper published at Hazelwood East High School in St. Louis County, Missouri.¹ Because the factual disputes in this case are inextricably intertwined with the central legal issue in this case, namely the extent of plaintiffs' first amendment right of expression as student members of *Spectrum*, this Court held on November 8, 1984, that the declaratory relief and liability questions should be heard by this Court sitting without a jury. Accordingly, the issues of declaratory relief and liability were bifurcated from the issue of damages and the trial of this matter was directed solely to the issue of liability. *Kuhlmeier v. Hazelwood School District*, No. 83-2033C(1), unpublished Order and Memorandum (E.D.Mo., November 8, 1984).

¹ Plaintiffs' original complaint also sought injunctive relief. However, by this Court's Order and Memorandum of November 2, 1984, plaintiffs' claims for injunctive relief were dismissed on the ground that said claims were mooted by plaintiffs' graduation from Hazelwood East High School. *Kuhlmeier v. Hazelwood School District*, 596 F.Supp. 1422 (E.D.Mo. 1984).

This case was tried to this Court sitting without a jury. This Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure. *Fed.R.Civ.P.* 52.

A. FINDINGS OF FACT

1. Plaintiffs Kathy Kuhlmeier, Lee Ann Tippet-West and Leslie Smart are residents of the State of Missouri and at all times relevant herein citizens of the United States. During the spring semester of 1983, said plaintiffs were students in the Journalism II class at Hazelwood East High School in St. Louis County, Missouri, and were members of the *Spectrum* staff. Ms. Kuhlmeier served as *Spectrum*'s layout editor and performed the page layouts for the stories at issue herein. Ms. Smart served as newswriter and movie reviewer for *Spectrum*. Ms. Tippet served as news feature writer, cartoonist and part-time photographer for *Spectrum*. In addition, Ms. Tippet prepared a graph to be used in connection with one of the articles at issue herein. Said plaintiffs did not write any of the stories at issue herein.

2. Defendant Hazelwood School District (hereinafter "District") is a Missouri public school district organized pursuant to, and operated in accordance with, statutes of the State of Missouri. Responsibility for the government and operation of the District is vested in a six (6)-director Board of Education (hereinafter "Board"). During the period relevant to this case, the Board was comprised of defendants Charles E. Sweeney (President), Joseph E. Donahue (Vice-President), August A. Busch, Jr. (Treasurer), Gwendolyn L. Gerhardt (Secretary), James E. Arnac, and Ann Gibbons. The Board controls all aspects of the District's operations, exercises general supervision over the schools of the District, and adopts and revises the

rules, regulations and policies of the District. Hazelwood East High School (hereinafter "Hazelwood East") is one of three secondary schools operated by the District. Hazelwood East has an enrollment of approximately 1,800 students in grades nine (9) through twelve (12).

During all periods relevant to this lawsuit, defendant Thomas J. Lawson has been the Superintendent of the Hazelwood School District, defendant Frances Huss has been the Assistant superintendent for secondary education of the Hazelwood School District, defendant Robert Eugene Reynolds has been the principal and instructional leader of Hazelwood East High School, and defendant Howard Emerson has been the coordinator of school information and year book sponsor at Hazelwood Central High School. Dr. Lawson is the chief executive officer of the District and is responsible for carrying out and enforcing the policies of the school board. Dr. Huss' responsibilities include supervision over all high school personnel, curriculum, activities, instruction, programs, budgets, and expenditures. He is the immediate supervisor of the District's high school principals, including the principal of Hazelwood East. In addition to being the educational leader and chief administrator of Hazelwood East, Mr. Reynolds is responsible for Hazelwood East's budget. In addition to his responsibilities at Hazelwood Central High School, Mr. Emerson served as temporary year book sponsor, journalism teacher and faculty advisor for *Spectrum* at Hazelwood East from May 1, 1983, through the end of the 1982-83 academic year.

All of the individual defendants in this case are citizens of the United States and reside within the Eastern District of Missouri. Both the District and Hazelwood East are located and operated exclusively within the Eastern District of Missouri.

3. During the 1982-83 academic year, the Hazelwood East curriculum included two (2) journalism classes, "Journalism I" and "Journalism II". In Journalism I, students were taught the

principles of reporting, writing, editing, layout, publishing, and journalistic ethics. Students could not enroll in Journalism II unless they first completed Journalism I. The textbook used for these courses, English and Hach, *Scholastic Journalism* (6th ed. 1978), was approved by the Board. Said textbook included chapters on "Understanding Press Law" and "Handling Sensitive Issues". Both Journalism I and Journalism II were taught at Hazelwood East by Robert Stergos from 1981 through April 29, 1983. The authors of the articles at issue herein, as well as plaintiffs, were enrolled in and completed Journalism I during the fall of 1982.

Journalism II was taught during the spring of 1983. Most Journalism II students, including plaintiffs and all of the authors of the articles in question, were juniors or seniors. In Journalism II, students continued to receive instruction on topics relevant to newspaper journalism. However, the primary activity of students enrolled in Journalism II was production and publication of Hazelwood East's school newspaper, *Spectrum*. This activity is best described as a classroom exercise or "lab" in which Journalism II students were given an opportunity to apply the knowledge and skills derived from the instruction they received. For example, the course description for Journalism II in the Curriculum Guide was, as follows: "Journalism II provides a laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I". In addition, the main concepts or ideas underlying Journalism II were, as follows:

1. An experience for students to practice journalistic techniques learned in Journalism I by publishing the school newspaper under the pressures of pre-established deadlines.
2. the legal, moral, and ethical restrictions imposed upon journalists within the community.
3. responsibility and acceptance of criticism for articles of opinion.

4. leadership responsibilities as issue and page editors.
5. creative and imaginative layouts which present the news within an accurate, fair, and balanced format.
6. pride in the school newspaper.
7. journalism as a potential career choice.

Both Journalism I and Journalism II were taught according to the Curriculum Guide which was approved by the Board.

Students received a grade and course credit for participation in Journalism II. Not all stories produced in the Journalism II class were printed in *Spectrum*. Grades were not affected by whether an article was published.

4. *Spectrum* was the school-sponsored newspaper at Hazelwood East. *Spectrum* was published approximately six (6) times per semester and typically included stories of interest to students, such as sports, interviews with faculty members, prom news, news items, movie reviews, editorials, and current items of interest. The paper typically covered four (4) sides of 11 inch by 17 inch paper. However, a six (6)-page paper was often printed in connection with special events, such as Homecoming, Prom, or the "Senior" issue. When *Spectrum* was published, it was sold during lunch for 25 cents per copy in the "commons" area of Hazelwood East. In addition, the paper could be purchased from the journalism room which was located in the library of Hazelwood East. The Board allocated operating funds to *Spectrum* in its annual budget and this amount was supplemented by the revenues received from sales of the newspaper. During the 1982-83 school year, printing expenses amounted to \$4,668.50, \$1,166.84 of which was defrayed through sales. *Spectrum* was printed by Messenger Printing Company, a private business.

For the most part, *Spectrum* was written and designed by students in the Journalism II class. *Spectrum's* staff was essen-

tially restricted to students in the Journalism II class. However, Hazelwood East students not enrolled in Journalism II could submit material for publication in *Spectrum* so long as the material met the standards set forth in Hazelwood School Board Policy No. 348.51. For example, *Spectrum* often published a column entitled "Letters to the Editor". There was one exception in the spring of 1983, because Elizabeth Conley, author of one of the stories at issue herein, was not enrolled in Journalism II and worked on the staff of *Spectrum* as part of an independent study program. The reason for this arrangement was that Ms. Conley was enrolled in a Calculus class during the period that the Journalism II class met. However, she did meet with Mr. Stergos, the teacher of the Journalism II class, during her independent study hour. With the exception of Ms. Conley, *Spectrum* staff members enrolled in Journalism II met each day during the spring of 1983 for approximately fifty (50) minutes in the journalism room with Mr. Stergos as their instructor. During this period, staff members worked on producing *Spectrum*. *Spectrum* staff members were permitted to obtain passes to leave the journalism room to do research and investigation on stories during the Journalism II period. In addition, some work was done by *Spectrum* staff members outside the Journalism II period, both during the school day and at home. However, the amount of work required outside of the regular class meeting period was not substantially greater than that required in other courses taught at Hazelwood East. In this regard, *Spectrum* was an integral part of the Journalism II course and was not akin to an extra-curricular activity, such as Hazelwood East's Student Council, team sports, or cheerleading squad.

The content of *Spectrum* included matters of interest to the entire Hazelwood School District community. Among the topics covered by articles appearing in *Spectrum* since 1976, were the following: 1) teenage dating; 2) the effects of television on children; 3) students' use of drugs and alcohol; 4) race relations; 5) teenage marriage; 6) the death penalty; 7) the St. Louis Schools desegregation case; 8) runaways; 9) teenage pregnancy;

10) religious cults; 11) the draft; 12) school busing; and 13) students' fourth amendment rights.

The Journalism II course was taught by, and *Spectrum* was produced under the direction of, a teacher at Hazelwood East. Robert Stergos was this teacher during the spring semester of 1983, until April 29, 1983. Mr. Stergos, as the teacher of Journalism II, both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*. Mr. Stergos selected the editor, assistant editor, layout editor and layout staff of the newspaper. He scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, counseled students on the development of the stories, reviewed the use of quotations, edited stories, adjusted layouts, selected the letters to the editor, edited the letter to the editor, called in corrections to the printer, and sold papers from the Journalism II classroom. Although several of these decisions were made in consultation with some of the students in the Journalism II class, many of these decisions were made without such consultation. It is clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content. Plaintiffs were well aware of Stergos' control over *Spectrum*.

A certain amount of control, or pre-publication review, was exercised by Mr. Stergos' superiors prior to the incident in question. Dr. Huss testified that the District had previously prevented the publication of articles in the District's school newspapers based on their content. Dr. Lawson testified that prior review of controversial or sensitive materials by a high principal was standard procedure. In early January, 1983, a meeting was held at which Dr. Huss, Mr. Reynolds, Mr. Stergos, and Ms. Jane Huff, Chairman of the English Department, were in attendance. At that meeting, Mr. Stergos was informed that Board policy should not be questioned in *Spectrum* and that Mr. Stergos was to submit a copy of each issue of *Spectrum* to Mr. Reynolds prior to its being sent to the printer. Mr.

Stergos complied with this request throughout the spring of 1983 and, in fact, Mr. Stergos passed this directive on to his successor, Mr. Emerson. In addition, in the early part of the spring semester of 1983, Dr. Huss advised each of the high school principals to limit the length of their respective school newspapers to four (4) pages in each issue due to budget overruns. Mr. Reynold communicated this directive to Ms. Huff. There was no direct evidence that Ms. Huff communicated this page limit rule to Mr. Stergos, but the control which Ms. Huff and Mr. Reynolds had over *Spectrum* is evidenced by the fact that they discussed deleting entirely the last two issues of *Spectrum* in the spring of 1983 due to budget overruns.

5. Mr. Stergos received extra-duty pay in the amount of \$325.00 for his services in connection with *Spectrum*. Mr. Stergos also received \$325.00 in extra-duty pay for his services as coach of the Hazelwood East baseball team. However, Dr. Huss testified that the amounts received by Mr. Stergos for his Journalism II services were only to reimburse him for the time he spent going to and from the printer and for the use of his own automobile therefor. The amount paid to Mr. Stergos was arrived at by multiplying the number of hours spent by him traveling to and from the printer times the applicable rate. This Court credits Dr. Huss' testimony.

6. Each issue of *Spectrum* was produced according to the following procedure. Ideas for stories were collected from *Spectrum* staff members on a weekly basis. Another source of story ideas were the letters to the editor. The student editors, in consultation with Mr. Stergos, would then select from among those story ideas that they wanted to develop into articles for publication. Mr. Stergos would then assign individual staff members to work on the ideas selected and determine how long each story should be. Although staff members often traded topics, Mr. Stergos was the final authority.

The person assigned to a story idea would then begin researching and writing the story. Initially, the precise content of the

story was left to the individual writer. However, once a draft was completed it was submitted to Mr. Stergos who would review the article, make comments, and return it to the student to be rewritten or researched further. Articles commonly went through this review and revision process three (3) or four (4) times.

A writer who used personal quotes in a story was required to obtain consent from each person quoted. The procedure for obtaining consent was to have the subject initial his quote on the draft.

Once a final draft was completed, the story would be submitted in copy sheet form to the copy editor to be proofed, then to the layout editor to be arranged on the page. At this stage of the process, Mr. Stergos often edited the articles himself. After the proposed layouts were approved by Mr. Stergos, the copy sheets of the stories, together with the layout diagrams, were sent to Messenger Printing Company in Kirkwood, Missouri, where galley proofs were prepared. After the galley proofs were returned from the printer, the authors would each proofread their own stories and their work would be double checked by *Spectrum* staff members. Mr. Stergos also proofread all articles. Corrections would be telephoned to the printer. The paper would then be printed in its final form and returned to Hazelwood East for sale.

7. On September 14, 1982, an item was published in *Spectrum* entitled "Statement of Policy". This article stated, in pertinent part, as follows:

Spectrum is a school funded newspaper; written, edited, and designed by members of the Journalism II class with assistance of advisor Mr. Robert Stergos.

Spectrum follows journalism guidelines that are set by *Scholastic Journalism* textbook,

Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Con-

stitution which states that: "Congress shall make no law restricting . . . or abridging the freedom of speech or the press. . ."

That this right extends to high school students was clarified in the *Tinker v. Des Moines Community School District* case in 1969. The Supreme Court of the United States ruled that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the school house gate." Only speech that "materially and substantially interferes with the requirements of appropriate discipline" can be found unacceptable and therefore prohibited.

According to Mr. Stergos, this policy statement was published in *Spectrum* at the beginning of each academic year. However, no documentary evidence was introduced to prove that his statement of policy was published at any other time. The following description did appear in every issue of *Spectrum* during the 1982-83 academic year:

Spectrum is published approximately every three weeks by students in the Journalism II class and printed by Messenger Printing Company in Kirkwood, Missouri.

In the January 14, 1980 issue of *Spectrum*, a non-by-lined editorial was printed entitled "The Right To Write". This editorial described *Spectrum*, as follows:

Because *Spectrum* is a member of the press and especially because *Spectrum* is the sole press of the student body, *Spectrum* has a responsibility to that student body to be fair and unbiased in reporting, to point out injustice and, thereby, guard student freedoms, and to uphold a high level of journalistic excellence. This may, at times, cause *Spectrum* to be unpopular with some. *Spectrum* is not printed to be popular. *Spectrum* is printed to inform, entertain, guide and serve the student body — no more and, hopefully, no less.

However, the statement of policy published on September 14, 1982, stated that "[a]ll non-by-lined editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East."

8. The Board created and published two (2) policies governing student expression within the District. The first, Board Policy 348.5, was entitled "Student Publications" and provided, as follows:

- a. Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors.
- b. Students who edit, publish or distribute handwritten, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications.
- c. Libel, obscenity, and personal attacks are prohibited in all publications.
- d. Unauthorized commercial solicitation will not be allowed on school property at any time. An exception to this rule will be the sale of non-school sponsored student newspapers published by students of the district at times and in places as designated by school authorities.

The second Board policy, Board Policy 348.51, is entitled "School Sponsored Publications" and provided, as follows:

School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications and regular classroom activities.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

- a. All material must be signed.
- b. The material will be evaluated by an editorial review board of students from the publications classes.
- c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final.

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the educational process.

9. Plaintiffs' testimony that they believed that they could publish "practically anything" in *Spectrum* was not credible. Plaintiffs were well aware of the control that Mr. Stergos exercised over *Spectrum*.

10. A poster hung on the wall of the journalism room at Hazelwood East which poster listed five (5) criteria for publication of sensitive issues. These criteria were taken from the *Scholastic Journalism* textbook and were identified by Mr. Stergos, as follows: 1) Is the issue relevant to readers?; 2) Will publication of the topic be helpful to readers or merely interesting or shocking?; 3) Will publication of the issue relate to aspects of the school program?; 4) Will the fact that eighteen year olds may vote help justify publication of some issues?; and 5) Will publication of the issue be for the common good, have news value, or merely be a private situation?

11. Board Policy No. 341.5, entitled "Controversial Issues", provided, in pertinent part, as follows:

It is the responsibility of the teacher to see that the controversial issues discussed in the classroom are relevant to the course of study, limited to the level of understanding and age group of the student, and maintained within the bounds of objectivity commonly acceptable to the community.

The student shall have rights during these discussions.

Specifically, the student shall have:

- a. The right to study any controversial issue which has political, economic, or social significance, and concerning which (at his/her level) he/she should begin to have an opinion.
- b. The right to have access to all relevant information, including the materials which circulate freely in the community.
- c. The right to study under competent instruction in an atmosphere free from prejudice and bias.
- d. The right to form and express one's own opinions on the controversial issues without, thereby, jeopardizing the relationship with the teacher or with the school.

12. Part 7 of the *Scholastic Journalism* textbook was entitled "Examining the Mass Media". Chapter 24 of said textbook, which chapter appears in Part 7, was entitled "Cannons of Journalism". The ethical rules adopted by the American Society of Newspaper Editors were reprinted in Chapter 24 at pages 272-75. Rule I-C-7, entitled "Fair Play", provided, as follows:

- a. Journalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports.

- b. Persons publicly accused should be given the earliest opportunity to respond.

In addition, the Chicago Sun-Times code of professional standards was reprinted at pages 265-66. It also contained a section entitled "Fair Play" and provided, in pertinent part, as follows:

We should at all times respect for the rights of those encountered in the course of gathering and presenting news. In this respect:

1. Any person or organization whose reputation is attacked is entitled to simultaneous rebuttal.
 2. Every effort should be made to present all sides of controversial issues.
 3. The anonymous quote, especially in stories involving controversial issues, is to be avoided except in those cases when the reasons for concealing the identity of the source are manifestly clear to the reader.
13. The articles in question were researched and written by several *Spectrum* staff members for publication in the May 13, 1983, issue of *Spectrum*. The articles were laid out to appear as pages 4 and 5 of said issue. A group of three articles covered the top half of pages 4 and 5 and the headline accompanying said articles appeared on both pages 4 and 5. The headline was, as follows:
- Pressure Describes It All For Today's Teenagers
Pregnancy Affects Many Teens Each Year
- The first article in the group of three was written by Andrea Callo and basically surveyed statistics concerning teenage pregnancy and briefly covered various topics including teenage sexuality, birth control, relations with parents, abortion, and the consequences of teenage pregnancy. The article included a table of statistics on teenage abortions covering the years 1976

through 1980. The article relied heavily on material from a *Reader's Digest* article. The second article in the group of three was entitled "Squeal Law" and was written by Christine De Hass. The article discussed a proposed rule that would require federally funded clinics to notify parents when teenagers sought birth control assistance. The article contained several quotes and relied heavily on an article appearing in *The New Republic*. The third article consisted of separate "personal accounts of three Hazelwood East students who became pregnant." The introduction to the article stated that "all names have been changed to keep the identity of these girls a secret." In each of the three accounts, the student discussed her reaction to becoming pregnant, her plans for the future, her relationship with the father, the reaction of her parents, and details about her sex life and use or non-use of birth control methods. The "fictitious" names of the three girls were "Terri", "Patti", and "Julie". A silhouette of a pregnant teenager was superimposed on the article.

Three (3) other articles were spread across the bottom half of pages 4 and 5. Beth Conley wrote an article entitled "Teenage Marriages Face 75% Divorce Rate". The article relied heavily on several sources, including a faculty member at Hazelwood East, and essentially surveyed the problems faced by teenage marriages. Mary Williams wrote an article entitled "Runaways And Juvenile Delinquents Are Common Occurrences In Large Cities", which article was actually laid out as two separate articles subtitled "Runaways" and "Juvenile Delinquents". The first half of the article, which relied heavily on sources, surveyed possible reasons for teenagers running away and identified sources of help that are available to runaways. The second half of the article, which also relied heavily on sources, surveyed the categories of juvenile delinquency and the procedures available to deal with juveniles. Finally, Shari Gordon wrote an article entitled "Divorce's Impact On Kids May Have Life Long Affect". The article dealt with the frequency and causes of divorce, as well as the affect of divorce on children. The article

contained a quote from a student who was identified only as a "Junior", as follows:

"My dad didn't make any money, so my mother divorced him."

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,"....

A Freshman identified by name as "Diana Herbert" gave the following quote:

"My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realized it wasn't me," added Diana.

Similar quotes were provided from students identified by name as Susan Kiefer and Jill Viola.

The article by Christine De Hass on three (3) accounts of pregnant students was prepared by submitting written questions, which she formulated, to the three (3) subjects. The three (3) students questioned were each advised by Ms. De Hass of the reason for which the information was being sought and told that it was to be used in the newspaper. The students were told that their names would not be used. The students agreed to participate, completed the questionnaires, and then returned them to Ms. De Hass. Ms. De Hass, in turn, edited them for publication and substituted pseudonyms for all names used. However, the three (3) students were not given any instructions with respect to obtaining parental consent. In addition, no evidence was presented with respect to the age of the three (3) students who were questioned.

Shari Gordon prepared her story, in part, by submitting written questionnaires to various students. The questions she submitted were written by her and then approved by Mr. Stergos. The questionnaires had to be signed and asked, *inter alia*, if the subjects wanted their names printed in the paper. Consent was obtained from all subjects quoted in the story, even where their names were not used, but the consent of the students' parents was not solicited nor were any parents contacted to explain or rebut the quoted statements of their children.

14. Mr. Stergos left his employment with the District on April 29, 1983. At the time he left, the May 13, 1983, issue of *Spectrum* was essentially ready to be sent to the printers. Effective May 1, 1983, at the direction of Drs. Huss and Lawson, Mr. Emerson took over as faculty advisor for *Spectrum*. Before Mr. Stergos left, he told Mr. Emerson that issues of *Spectrum* must be submitted to Mr. Reynolds prior to publication. Mr. Emerson took Mr. Stergos' place in the Hazelwood East yearbook class, but a Mrs. Ludwinski was the substitute teacher for the Journalism II class. Mrs. Ludwinski did not have a journalism background and, therefore, Mr. Emerson assisted the Journalism II class in publishing the last two issues of *Spectrum* during the spring of 1983.

The deadline for the May 13, 1983, issue of *Spectrum* to be in copy sheet form was May 4, 1983. On or about May 5 or 6, 1983, Mr. Emerson took the copy sheets of all of the articles scheduled for publication in the May 13, 1983 issue of *Spectrum*, including the articles in question and the layout diagrams for the issue, to Messenger Printing Company. At the same time, *Spectrum* staff members prepared a banner announcing publication of the stories in the forthcoming May 13, 1983 issue of *Spectrum*. Similar banners were prepared for every issue of *Spectrum*. This particular banner advertised, *inter alia*, articles on "Teenage Pregnancy", "Juvenile Delinquency", and "Divorce". The banner was approximately nine (9) feet long by two (2) feet wide and was hung from an area over the

Hazelwood East cafeteria, an area through which Mr. Reynolds had to pass to get to his office.

The May 13, 1983, issue of *Spectrum* was delivered to Mr. Emerson at Hazelwood East in galley proof form on Tuesday, May 10, 1983, by Messenger Printing Company. The newspaper was then proofread by the *Spectrum* staff and by Mr. Emerson. Several corrections were made as a result of the proofreading. Mr. Emerson personally made a change in Shari Gordon's story by deleting Diana Herbert's name in connection with her statements that were quoted in the paper.

On the same date, Mr. Emerson left a set of *uncorrected* galley proofs of the May 13, 1983 issue with Mr. Reynolds' secretary. When Mr. Emerson did not hear from Mr. Reynolds, Mr. Emerson telephoned Mr. Reynolds at approximately 3:15 p.m. on May 11, 1983, regarding the *Spectrum* galley proofs. Mr. Reynolds read through the issue while he kept Mr. Emerson on the line, a process that took approximately twenty (20) minutes. Mr. Reynolds testified that, at the time, he thought Mr. Emerson was at Messenger Printing Company and that he had to make an immediate decision. Mr. Reynolds did not believe that there was time to make any changes in the content of the stories and that no paper would be produced if the issue were delayed for any amount of time. This Court credits Mr. Reynolds' testimony and his beliefs were reasonable under the circumstances. No evidence was presented that his beliefs were unreasonable. Mr. Reynolds asked Mr. Emerson what would have to be done to delete the stories in question and Mr. Emerson responded that pages 4 and 5 could be deleted and page 6 could be changed to page 4. Mr. Reynolds directed Mr. Emerson to effectuate this. Mr. Reynolds then telephoned Dr. Huss, his immediate supervisor, to apprise Dr. Huss of his decision and Dr. Huss concurred.

The stories prepared for pages 4 and 5 of the May 13, 1983 issue of *Spectrum* were deleted without notice to any members

of *Spectrum's* staff. *Spectrum* staff members learned that the stories in question had been removed when the final copies of the May 13, 1983 issue were delivered to the school for sale on the morning of May 13, 1983. Shortly after the deletions were discovered, a group of seven (7) *Spectrum* staff members met with Mr. Reynolds in his office to protest the deletions. Mr. Reynolds advised the group that the articles were deleted because they were "too sensitive" for "our immature audience of readers". Mr. Reynolds did not mention budget or page limitations as a reason for his decision. Following this meeting, the *Spectrum* staff took a vote and decided to sell the May 13, 1983 issue, despite the deletions.

The following Monday, May 16, 1983, the following notice was posted in the journalism room at Hazelwood East:

The content of some of the articles were *personal* and highly sensitive — people and names were used.

The information was sensitive and totally unnecessary to be included in the school newspaper.

They have many other opportunities to achieve goals in journalism class or publishing of the school newspaper that do not require that kind of reporting.

Learning can take place in research and reporting that is less sensitive, less controversial, and certainly something that is just as beneficial to the students.

Defendants deny that they caused this notice to be posted, but admit that it corresponds to public statements made by Mr. Reynolds and Dr. Lawson.

On the same date, Mr. Reynolds met with *Spectrum* staff members, together with Mr. Emerson and Ms. Jane Huff, to discuss deletion of the the stories in question from the May 13, 1983 issue. At said meeting, Mr. Reynolds stated that the stories were deleted because they were inappropriate, personal, sensitive and unsuitable for the newspaper.

Also on May 16, 1983, Dr. Lawson sent a memorandum to the Board with copies of the deleted stories attached thereto. In the memorandum, Dr. Lawson stated his approval for the deletions and the reasons therefor, as follows:

It was necessary for Mr. Reynolds to remove this because he wasn't aware that the stories were even being prepared — or the sensitive, controversial nature of the story.

Following the deletions of the stories in question, Mr. Reynolds and Dr. Lawson made numerous statements to the press regarding their reasons for the censorship. In one article, Mr. Reynolds was quoted, as follows:

"Our position on these articles is that the content was personal and highly sensitive."

"It was inappropriate to be used in a school newspaper."

In another article, Dr. Lawson was quoted, as follows:

"It was information that was very sensitive and totally unnecessary to be included in the school newspaper."

15. Mr. Reynolds testified that he had no objection whatsoever to the article by Beth Conley on teenage marriages, the article by Mary Williams on runaways and juvenile delinquents, the article by Andrea Callo on teenage pregnancy, or the article by Christine De Hass on the squeal law. However, Mr. Reynolds objected to both the three (3) personal accounts of pregnant Hazelwood East students and Shari Gordon's story on the impact of divorce on children. With respect to the personal accounts of three (3) Hazelwood East students who were pregnant, Mr. Reynolds was concerned that the girls had been described to the point where they could be identified by their peers. In addition, he objected to their discussion of their sexual activity. With respect to Shari Gordon's story, Mr. Reynolds objected to the use of Diana Herbert's name and the inclusion of the following quotes from her:

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,"....

"My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me,"....

In addition, Mr. Reynolds objected to the above portion of Shari Gordon's story, because he thought that fairness required that her parents be notified and given an opportunity to respond. This Court credits Mr. Reynolds' testimony.

Although Mr. Reynolds was aware of certain budgetary constraints and the directive that *Spectrum* be limited to four (4) pages per issue, but for his objections to the personal accounts of three (3) Hazelwood East students who were pregnant and certain portions of Shari Gordon's story, Mr. Reynolds would not have deleted the articles in question from the May 13, 1983 issue of *Spectrum*.

16. In the spring of 1983, there were approximately eight (8) to ten (10) students at Hazelwood East who were pregnant. Mr. Reynolds' concern that the students discussed in the three (3) personal accounts could be identified was legitimate. The subject identified as "Terri" might be identified because it could be derived from the article that her due date was sometime in July, 1983, and that she had dropped out of school. Ms. Jane Huff testified that on or about the time the articles in question were deleted, she thought she could identify two (2) of the subjects discussed in the three (3) personal accounts. She further testified that at the time of trial she could positively identify one (1) and possibly all three (3). This Court credits Ms. Huff's testimony.

17. Expert testimony was received from two (2) individuals in this case. Plaintiffs' expert witness was Dr. Robert Knight, Professor of Journalism at the University of Missouri-Columbia. Dr. Knight has had extensive experience with high school newspapers and high school journalism contests. He based his opinion in this case on information that he received from Mr. Stergos, documents supplied to him and the articles in question. It was Dr. Knight's opinion that the articles in question complied with recognized journalism standards, that nothing in their content was libelous or obscene and that they would not cause a material or substantial disruption of the educational environment at Hazelwood East. However, on cross examination Dr. Knight admitted that his actions with respect to this case have been less than objective and independent. Prior to a national convention of investigative reporters and editors in St. Louis, Missouri, during June, 1983, Dr. Knight distributed originals of the stories in question to persons attending the convention. The stories were accompanied with a one (1) page summary of the facts and a statement of Dr. Knight's own opinions. Dr. Knight encouraged those in attendance to discuss the issues raised by the deletions of the stories in question and to come to the aid of plaintiffs. Dr. Knight presented his case to the executive committee of the convention and said committee determined that so-called "student press rights" were outside the province of its organization. In addition, Dr. Knight was actively involved in keeping a certain journalism publication apprised of the progress of this case. Dr. Knight also described what is meant by the term "fairness" in the journalism field. To be fair is to give a complete picture in a story and an opportunity for all sides to an issue to respond.

Defendants' expert witness was Mr. Martin Duggan, a recent appointee to the Federal Commission on Compensation and former editorial page editor for the *St. Louis Globe Democrat*. Mr. Duggan has been a journalism instructor at Fontbonne College and supervised the production of a newspaper that was part of the journalism courses taught by Mr. Duggan. Mr. Duggan's

experience with high school journalism was limited to being a guest lecturer and giving seminars and work shops, but he once acted as an adviser for a newspaper published by Junior Achievement, a youth organization. Mr. Duggan's first contact with the articles in question was at his deposition in April, 1984. He testified that "fairness and balance" is a term of art in the journalism field and requires journalists to provide all sides to a particular issue. Mr. Duggan testified that Shari Gordon's divorce story did not meet this standard because Diana Herbert's father was not given an opportunity to respond. In addition, he thought that both Shari Gordon's story and the three (3) personal pregnancy accounts were not appropriate for publication because they involved invasions of privacy. Mr. Duggan further testified that there is a difference between editing and censorship. Censorship comes from an outside source, whereas editing is the prerogative of an authority within the publishing entity.

Mr. Duggan's opinion is entitled to more weight than Dr. Knight's opinion. Dr. Knight is deeply and personally involved with high school press issues and his own personal interests are basically aligned with an expansion of student press rights. Mr. Duggan, on the other hand, was an objective and independent witness who was not even compensated by defendants for his testimony.

18. *Spectrum* was an integral part of the Journalism II class and was not a public forum.

19. Mr. Emerson, Mr. Reynolds, Dr. Huss, and Dr. Lawson are professional educators with many years of experience in dealing with high school age students. Their judgment that portions of the articles in question were not appropriate for high school age readers or publication in a school sponsored newspaper is both reasonable and entitled to great deference.

20. Plaintiffs and the other members of Journalism II class in the spring of 1983 received academic credit and a grade for their

work in said class. No grade was affected by reason of the incident involved therein.

21. Several copies of the articles in question were circulated in xerox form at Hazelwood East subsequent to May 13, 1983. No efforts were made by defendants to stop said circulation or to punish the individuals responsible therefor.

B. CONCLUSIONS OF LAW

This case concerns the scope of high school students' first amendment rights in the context of an official school-sponsored newspaper. This Court possesses subject matter jurisdiction pursuant to 28 U.S.C. §§1331, 1343(3) and 1343(4), and plaintiffs' claims for relief are authorized by 28 U.S.C. §§2201, 2202; 42 U.S.C. §§1983, 1988.

Plaintiffs seek a declaration by this Court that: a) *Spectrum* was a free speech forum fully protected by the first amendment; b) defendants' prior restraint of the May 13, 1983 issue of *Spectrum* denied plaintiffs' rights secured by the first and fourteenth amendments; and c) defendants' policies, practices, customs, rules and regulations governing publication of *Spectrum* failed to comport with constitutionally-mandated standards. As discussed *infra*, this Court concludes that *Spectrum* was not a public forum and that defendants' conduct in this case did not deny plaintiffs their constitutional rights. This Court does not find it necessary to address the facial constitutionality of defendants' policies, practices, or rules.

The starting point for this Court's analysis is the almost talismanic phrase uttered by the Supreme Court in *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969): high school students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." In *Tinker*, the Supreme Court held that the first amendment rights of three high school students were violated when they were suspended for wearing black armbands as a Vietnam War pro-

test. The court held that such symbolic speech could not be punished where it would not result in "substantial disruption or material interference with school activities". *Id.* at 514. In so holding, the Supreme Court made it clear that the first amendment rights of students in a high school setting are not coextensive with those of adults. *See Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980). Student speech or conduct may be regulated or prohibited in the school setting, if it "materially disrupts class work or involves substantial disorder or invasion of the rights of others." *Id.* at 513. The unique circumstances of the school environment justify such limits on students' first amendment rights. *Id.* at 506. "In the high school setting, school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students." *Nicholson v. Board of Education*, 682 F.2d 858, 863 (9th Cir. 1982). *Tinker* and its progeny establish that in balancing students' free speech rights against the discretion needed by educators, "school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech, and . . . courts will not rest content with officials' bare allegation that such a basis existed.'" *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), quoting *Eisner v. Stamford Board of Education*, 440 F.2d 803, 810 (2d Cir. 1971). Public schools constitute an arm of the state and it is the role of the Courts under our Constitution to resolve the disputes inherent in such a balancing process. *Fraser v. Bethel School District*, Nos. 83-3987 and 83-4142, slip op. at 5 (9th Cir. March 4, 1985).

Two lines of cases have developed for dealing with student free speech and press issues. One line of cases consists of those situations where student speech or conduct occurred outside of official school programs. In the other are cases where the speech or conduct in question occurred within the context of school-sponsored programs. The conduct of the students in *Tinker* was symbolic speech that was privately initiated and car-

ried out independent of any school-sponsored program or activity. Students' first amendment rights generally prevail where the speech or conduct that is sought to be prohibited or regulated is private, non-school-sponsored and non-program related. See, e.g., *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (regulations that prevented distribution of private student newspaper held invalid); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (regulations that restrained distribution of non-school-sponsored literature held invalid); *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972) (rule prohibiting distribution of underground newspaper held invalid); *Shamley v. Northeast Independent School District, Bexar County, Texas*, 462 F.2d 960 (5th Cir. 1972) (prior restraint on distribution of underground newspaper held invalid); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971) (prior restraint on distribution of underground newspaper held invalid); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971) (prior restraint on distribution of underground newspaper invalidated); *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D.Va. 1977) (regulations that prevented distribution of underground newspaper invalidated); *Poxon v. Board of Education*, 341 F. Supp. 256 (E.D.Ca. 1971) (prior restraint on distribution of non-school-sponsored newspaper held unconstitutional). On the other hand, the results have been mixed in cases where educators have attempted to regulate, prohibit or punish student speech or conduct in the context of school-sponsored publications, activities or curricular matters. See e.g., *Fraser v. Bethel School District*, Nos. 83-3987 and 83-4142, (9th Cir. March 4, 1985) (student could not be disciplined for sexual content of student government nomination speech given during school assembly); *Nicholson v. Board of Education*, 682 F.2d 858 (9th Cir. 1982) (pre-publication review of journalism class-produced school newspaper upheld); *Seyfried v. Walton*, 668 F.2d 214 (3rd Cir. 1981) (school legally prevented performance of school-sponsored theatrical production); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925

(1978) (distribution of sex questionnaire in school newspaper properly prevented due to possible harm to students); *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977) (educators enjoined from prohibiting publication of article in school newspaper); *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D.Ma. 1984) (school officials enjoined from preventing publication of student quote in year book); *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D.Ga. 1980) (school district enjoined from censoring and controlling student newspaper published by journalism class); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979) (school officials properly prevented publication of letter in official school newspaper that would result in substantial disruption of school); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974) *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975) (school authorities violated students' rights in seizing and preventing distribution of sex information supplement in school newspaper); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (school officials enjoined from prohibiting publication of Vietnam protest ad in school newspaper).

— In the first line of cases, the free speech and press rights of students are at their apogee. The primary focus is on the extent to which the exercise of such rights would interfere with the educational process. In such cases, school officials are rarely able to show that non-program related student speech or conduct will materially disrupt the educational process. In the second line of cases, however, the interests of school officials and the special function performed by schools in our society are given considerably more weight. The initial focus is not so much on the effect of the students' speech or conduct as it is on the nature of the school-sponsored program or activity in question. Where the particular program or activity is an integral part of the school's educational function, something less than substantial disruption of the educational process may justify prior restraints on students' speech and press activities. The

following is an acceptable articulation of the applicable standard:

[T]he rule has been wisely established that decisions of school officials will be sustained, even in a First Amendment context, when, on the facts before them at the time of the conduct which is challenged, there was a substantial and reasonable basis for the action taken.

Frasca, 463 F.Supp. at 1052 (citation omitted). The second line of cases is applicable to the case at bar, because *Spectrum* was the official school-sponsored newspaper of Hazelwood East and was produced by students in the Journalism II class. See *Findings of Fact* Nos. 3 and 4.

When faced with determining the scope of students' first amendment rights within the context of school-sponsored programs, courts focus on whether the particular program or activity is an open and public forum of free expression or an integral part of the curriculum. While a public high school is under no obligation to provide its students with a public forum for free expression, *Bender v. Williamsport Area School District*, 742 F.2d 538, 546-47 (3rd Cir. 1984), where school officials do create an open forum for student expression, the first amendment greatly limits the extent to which school officials may restrain or silence student expression based on the message or content of said expression. *Id.* See also *Widmar v. Vincent*, 454 U.S. 263, 267-268 (1981). In *Fraser v. Bethel School District*, Nos. 83-3987 and 83-4142 (9th Cir. March 4, 1985), school officials were under no obligation to organize a student assembly for the purpose of allowing students to make speeches nominating candidates for student government office. However, having organized such an assembly and having "created an open forum for students to express their political views", school officials could not punish a student for making a speech that was neither obscene nor disruptive. *Fraser*, slip op. at 18. The *Fraser* court viewed the assembly as far removed

from the "compulsory environment of the class room", for the following reasons:

Although Fraser delivered his speech to a school-sponsored assembly, his speech was clearly not part of the school curriculum. The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches proscribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.

Fraser, slip op. at 15-16.

The public forum/curriculum distinction was the "critical factor" in *Seyfried v. Walton*, 668 F.2d 214 (3rd Cir. 1981), which upheld a public high school superintendent's decision to cancel a high school dramatic production of the musical "Pipin", because of its sexual theme, against the assertion that the cancellation violated students' first amendment rights of expression. The court reasoned, as follows:

We believe that the district court properly distinguished student newspapers and other "non-program related expressions of student opinion" from school-sponsored theatrical productions. . . . The critical factor in this case is the relationship of the play to the school curriculum. As found by the district court, both the staff and the administration view the spring production . . . as "an integral part of the school's educational program." Participation in the play, though voluntary, was considered part of the curriculum in the theatre arts.

Id. at 216 (citations omitted). The *Seyfried* Court also viewed the cancellation as justified by the school's "important interest in avoiding the impression that it endorsed a viewpoint at variance with its educational program." *Id.* The holding that the students' first amendment rights were not violated, was further buttressed by the following facts:

[N]o student was prohibited from expressing his views on any subject; no student was prohibited from reading the script, an unedited version of which remains in the school library; and no one was punished or reprimanded for any expression of ideas.

Id.

The public forum/curriculum distinction was also a significant factor in several cases involving school-sponsored newspapers. In *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977), the court held that school officials could not prohibit publication of an article in the school newspaper. The court reasoned that "because the newspaper was established as a public forum and not as an official publication, it [could not] be viewed as part of the curriculum" *Id.* at 158. In *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974) *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975), school officials were enjoined from preventing distribution of copies of the school newspaper which contained a sex information supplement. The court rejected the defendants' argument that the prior restraint was justified under their authority over secondary school curriculum, as follows:

In this court's view, publication of the newspaper and supplement is an extracurricular activity rather than part of the curriculum. This view is buttressed by the fact that no academic credit is given for serving as a member of the newspaper staff.

Id. at 1166. In *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), school officials were enjoined from restraining publication in the school newspaper of a paid advertisement in opposition to the Vietnam War. The *Zucker* Court, like the Court in *Bayer*, rejected the defendants' argument that the newspaper was part of the curriculum and an educational device. The court held that "within the context of the school and educational environment, [the school newspaper] is a forum for the

dissemination of ideas." *Id.* at 105. However, in *Nicholson v. Board of Education*, 682 F.2d 858 (9th Cir. 1982), the right of school officials to exercise pre-publication review of a school-sponsored newspaper was upheld. The court reasoned, as follows:

Writers on a high school newspaper do not have an unfettered constitutional right to be free from pre-publication review. In fact, the special characteristics of the high school environment, *particularly one involving students in a journalism class that produces a school newspaper*, call for supervision and review by school faculty and administrators.

Id. at 863 (emphasis added). The significance of the curricular aspect of the newspaper in *Nicholson*, was recently emphasized by the Ninth Circuit in *Fraser*, in distinguishing the student assembly in *Fraser* from the school newspaper in *Nicholson*, as follows:

Nicholson did involve the compulsory environment of the classroom. The publication of the newspaper was part of a journalism class in which students were being taught how to be journalists. As we explained, "[T]he school possessed a substantial educational interest in teaching young, student writers journalistic skills which stressed accuracy and fairness." . . . Indeed, in *Nicholson* we explicitly pointed out that school officials had much greater latitude in reviewing a student publication that was part of the curriculum than in the case of a student newspaper that was an extra-curricular activity.

Fraser, slip op. at 16 (citation omitted).

In the case at bar, it is the opinion of this Court that *Spectrum* was an integral part of Hazelwood East's curriculum, as opposed to a public forum for free expression by students. See *Findings of Fact No. 18*. Several facts in this case lead directly

to a finding that *Spectrum* "did involve the compulsory environment of the classroom." *Fraser*, slip op. at 16. *Spectrum* was produced by members of the Journalism II class, which class was taught by a faculty member according to the Hazelwood East curriculum guide. *See Findings of Fact No. 3*. A textbook was used in the class, and a grade and academic credit was awarded for completion of the class. *Id.* The plaintiffs in this case, as well as other members of *Spectrum* during the spring of 1983, received both a grade and academic credit for their work on *Spectrum*. *See Findings of Fact No. 20*. The curriculum guide of Hazelwood East described the Journalism II class as a "laboratory situation", and *Spectrum* was the laboratory exercise. *See Findings of Fact No. 3*. *Spectrum's* staff was essentially restricted to students in the journalism class, said class met regularly in a classroom to work on *Spectrum*, and the nature of the out-of-class work required for *Spectrum* was not substantially greater than that required in other courses taught at Hazelwood East. *See Findings of Fact No. 4*. Board Policy 348.51 stated that school-sponsored publications, of which *Spectrum* was one, were "developed within the adopted curriculum". *See Findings of Fact No. 8*. The amount of extra-duty pay received by Mr. Stergos does not indicate that his services in connection with *Spectrum* were in the nature of an extracurricular activity. *See Findings of Fact No. 5*. Finally, the most telling facts are the nature and extent of the Journalism II teacher's control and final authority with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by Hazelwood officials in the past. *See Findings of Fact No. 4*. That control was not exercised to any lesser extent with respect to the articles in question. *See Findings of Fact No. 13*. Plaintiffs' beliefs to the contrary were not credible. *See Findings of Fact No. 9*. All these facts, taken together, convince this Court that Hazelwood East did not create *Spectrum* as an open or public forum of free expression by its students.

Although *Spectrum* was an integral part of the Journalism II curriculum at Hazelwood East, it does not follow that school officials were completely free of constraints imposed by the first amendment. *Kuhlmeier v. Hazelwood School District*, 578 F. supp. 1286, 1291 (E.D.Mo. 1984). In the context of school-sponsored programs, as discussed *supra*, school officials still must demonstrate that there was a reasonable basis for the action taken, based on the facts before them at the time of the conduct in question. *Frasca*, 463 F. Supp. at 1052. In the case at bar, there were several articulated reasons that satisfy this standard and thus justified Mr. Reynolds' action. Under this standard, this Court accepts as true Mr. Reynolds' reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question. *See Findings of Fact No. 14*. This Court also accepts as true, Mr. Reynolds' testimony that his objections were directed only to the article dealing with the personal accounts of three (3) pregnant Hazelwood East students and Sherri Gordon's story on the impact of divorce on children. *See Findings of Fact No. 15*. But for these limited objections, Mr. Reynolds would not have deleted the articles in question from the May 13, 1983 issue of *Spectrum*. *Id.*

First, with respect to the personal accounts of three (3) pregnant students, Mr. Reynolds' concern that the students' anonymity could be lost was legitimate and reasonable. It was based on objective facts, such as the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article. Such a loss of anonymity could have resulted in unwarranted invasions of privacy. This was not only a reasonable basis for Mr. Reynolds' conduct, but was also one of the bases mentioned by the Supreme Court in *Tinker* as justifying a prior restraint of student speech. *Tinker*, 393 U.S. at 513 ("invasion of the rights of others"). In addition, the subjects of the three (3) personal accounts provided details about their sex lives and use or non-use

of birth control methods. This aspect of the article renders Mr. Reynolds' action particularly justifiable. The presence of personal material concerning the subjects' sex lives exacerbated the harm that could result from their loss of anonymity. Further, this aspect of the article is analogous to the play "Pipin" in *Seyfried*, that was cancelled on account of its sexual content. Hazelwood East may properly prevent the publication of such material in its official school-sponsored newspaper to avoid the impression that it endorses the sexual norms of the subjects of the article. *Seyfried*, 668 F.2d at 216. More importantly, this Court credits the judgment of Hazelwood East officials that such material, especially in the context of a school newspaper produced by a journalism class, is not appropriate for some of *Spectrum's* readers, given their age and maturity. *See Findings of Fact No. 19.*

Second, with respect to Sherri Gordon's story on divorce, potential problems with invasion of privacy also justified Mr. Reynolds' conduct. Although Diana Herbert's name was going to be deleted in final form, Mr. Reynolds was not aware of this because he was given an uncorrected copy of the galley proofs and his conduct must be evaluated according to the facts known to him at the time he acted. *See Findings of Fact No. 14.* The quote attributed to Miss Herbert revealed several "facts" about her parents. Aside from the fact that Miss Herbert's quote is relevant only to the *causes* of her parents' divorce, as opposed to the impact of their divorce upon her which impact was supposed to be the focus of the article, there is no indication in the article that her parents, especially her father, were given any opportunity to respond or rebut her allegations. Thus, there is serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class. *See Findings of Fact Nos. 12, 17.*

These reasons amply justified Mr. Reynolds' actions. The facts that a large banner advertised the general topics to be

covered in the May 13, 1983 issue and that Mr. Reynolds undoubtedly saw said banner several days prior to his conduct, merely demonstrates that Mr. Reynolds did not, as a matter of principle, oppose discussion of said topics in *Spectrum*. His objections legitimately went to the manner in which two (2) of the topics were handled. His objections were not pretextual. Accordingly, plaintiffs' first amendment rights, to the extent they applied to *Spectrum*, were not violated.

This Court is also convinced that defendants' conduct with respect to the May 13, 1983 issue of *Spectrum* did not "so chill the school's atmosphere for student . . . expression that they cast 'a pall of orthodoxy over the school community, . . .'" *Seyfried*, 668 F.2d 216 (citation omitted). Several copies of the articles in question were circulated in xerox form at Hazelwood East subsequent to May 13, 1983. *See Findings of Fact No. 21.* Moreover, no efforts were made by defendants to stop said circulation or to punish the individuals responsible therefor. Thus, defendants did not attempt to quash discussion of the topics in question. Defendants merely exercised their discretion, in a proper manner, with respect to a product of the Hazelwood East curriculum.

Plaintiffs request that this Court invalidate the various regulations and policies developed by defendants to deal with student expression in the District's schools. Plaintiffs argue that defendants' conduct herein was not based on adequately clear guidelines; and that Board Policies 348.5 and 348.51, the Curriculum Guide for Journalism II, and Mr. Reynolds' pre-publication review policy were unconstitutionally vague. However, the cases relied on by plaintiffs involved regulation of private student expression or student expression within the context of school-sponsored public forums of free expression. The full panoply of precise substantive and procedural regulations is not required within the context of a program that is an integral part of a high school's curriculum. That is what is meant by the rule that school officials have a great deal of discretion in the

realm of curriculum. Thus, plaintiffs' request is not well-taken under the facts of this case.

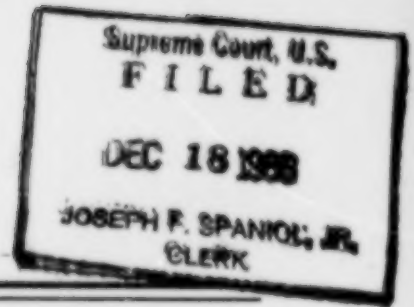
In conclusion, this Court holds and declares that plaintiffs' first amendment rights were not violated when defendants prevented the publication of the articles in question in the May 13, 1983 issue of *Spectrum*.

/s/ John F. Nangle
United States District Judge

DATED: May 9, 1985

OPPOSITION BRIEF

(8)
No. 86-836



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al*,
Petitioners,

VS.

CATHY KUHLMEIER, *et al*,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents take issue with the characterization, in petitioners' statement of questions presented, of the decision of the United States Court of Appeals for the Eighth Circuit to which a writ of certiorari is now requested. That decision did hold that *Spectrum*, the Hazelwood East High School newspaper, is a public forum, but it did not find, as petitioners assert, that "therefore, the principal could only prevent publication of the articles at issue if their publication would subject the school to tort liability." What the court of appeals actually held was that because *Spectrum* was a public forum, it could be subjected to pre-publication censorship by school officials only if those officials could demonstrate facts which would have led them to reasonably forecast that publication of the objectionable material "would have materially disrupted classwork, given rise to substantial disorder, or invaded the rights of others."

Respondents contend that the questions presented should be framed as follows:

1. Is a high school newspaper which is intended to be and is operated as a conduit for student viewpoint a "public forum" for the purpose of the First Amendment?
2. If so, may school authorities engage in pre-publication censorship of that newspaper where they cannot demonstrate facts which would have led them to reasonably forecast that publication of the objectionable material would materially disrupt classwork, give rise to substantial disorder, or invade the rights of others?

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BRIEF IN OPPOSITION

The respondents, Cathy Kuhlmeier, et al., respectfully pray that this court deny petitioners' request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered July 7, 1986.

STATEMENT OF THE CASE

Respondents adopt as their statement of the case the facts set forth in the majority opinion of the United States Court of Appeals for the Eighth Circuit in this cause. That opinion has been reproduced in its entirety in the appendix to petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Supreme Court Rule 17 provides that a review on writ of certiorari "is not a matter of right; but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup.Ct.R. 17. No such reasons are present here.

Petitioners do not contend that the Eighth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," Sup.Ct.R. 17.1(a), nor do they assert that it has "decided a federal question in a way in conflict with applicable decisions of the Court." Sup.Ct.R. 17.1(c). Rather, they suggest that the Eighth Circuit's judgment decided an important question of federal law which has not been, but should be, settled by this Court, and that the judgment is in conflict with the decision of another federal court on the same matter.

These claims are wholly without merit. The judgment of the Eighth Circuit involves a relatively straightforward application of standards established by this Court more than a decade and a half ago in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and petitioners cite no decisions of other federal appellate courts with which the judgment is in actual conflict. Authorities cited by petitioners in their attempt to manufacture a conflict are distinguishable on their facts. Certiorari should therefore be denied.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENT OF THE EIGHTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This case involves the First Amendment rights of the student press in a public high school. It does not

concern faculty mailboxes (see *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), charity drives aimed at federal employees (see *Cornelius v. NAACP Legal Defense and Educational Fund*, __U.S.__, 105 S.Ct. 3439 (1985), or indecent language by a speaker at a school assembly. See *Bethel School District No. 403 v. Fraser*, __U.S.__, 106 S.Ct. 3159 (1986).

The standards governing the First Amendment rights of public high school students were settled by this Court long ago in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In that case this Court ruled that student expression may be curtailed only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513. Correspondingly, this Court determined that in order for a prohibition on protected speech to be adjudged valid, school officials must demonstrate that the prohibition was "necessary to avoid material and substantial interference with school work or discipline *** or the rights of others." *Id.* at 511. These are the very standards applied by the Eighth Circuit in this case. Even a cursory review of the Eighth Circuit's opinion reveals that it did not find, contrary to the suggestion made by petitioners at the outset of their brief, that school officials may act only where failure to do so would subject the school to tort liability.

Petitioners' real objection to the Eighth Circuit's judgment appears to be simply that the *Tinker* standards should not have been applied on the facts presented here. Their argument is premised on the belief that *Spectrum*, the newspaper in question, was merely part of the Hazelwood East High School curriculum and not a forum for student expression. The Eighth Circuit, however, expressly found to the contrary. The Eighth Circuit's review of the record, upon which this finding was based, was authorized by this Court's decision in *Bose Corporation v. Consumers Union of U.S.*, 466 U.S. 485 (1984). No grounds exist for overturning that finding.

Because *Spectrum* is not a curricula paper, the problems of interference with the discretion of school administrators over matters of curriculum cited by petitioners are illusory. The Eighth Circuit's judgment will not impair the ability of such administrators to carry out their legitimate functions, but will merely insure that they obey fundamental constitutional guarantees.

As the Eighth Circuit pointed out in its opinion, petitioners do not claim that the materials censored from *Spectrum* could reasonably have been forecast to materially disrupt classwork or give rise to substantial disorder in the school, there was no evidence in the record to support the administrator's view that the materials were inappropriate for publication given the age and immaturity of some of its readers, and no tort action could have been maintained against the school based on those materials.

Petitioners argue that the Eighth Circuit's judgment will place school authorities in the untenable position of having to make "highly technical and potentially costly legal judgments about tort liability and the limits of First Amendment protection." No such claim can be sustained on the record here. It was the absence of *any* informed judgment that precipitated the controversy. Petitioners made no attempt to obtain any legal guidance before they acted, nor did they explore any alternatives less drastic than censorship of the two entire pages of the paper. Such less drastic alternatives were available. Petitioners' justification for failing to follow them was found untenable by the Eighth Circuit.

The weakness of petitioners' position in this case is perhaps best shown through reference to the censored materials themselves. Those materials have been provided to this Court by respondents in a separate appendix. On review of those materials, and considering the record as a whole, it is apparent that petitioners acted merely because certain newspaper stories offended their personal sensibilities. The Eighth Circuit's determination that this was impermissible under the

First Amendment surely cannot, at this late date, be considered as raising any new or unsettled principles of law.

II. THE JUDGMENT OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS

Petitioners cite numerous federal appellate court decisions involving the First Amendment rights of public high school students in an attempt to demonstrate some conflict between the circuits regarding the matters decided by the Eighth Circuit in this case. Without exception, however, those decisions have recognized, as did the court here, that the applicable standards are those established by this Court in *Tinker v. Des Moines Independent Community School District*, *supra*. To the extent that the results reached by the various courts may diverge, the explanation is not so much a question of doctrinal disarray, but the problem of applying established doctrine to many and varied factual situations. This is a problem which no pronouncement by this Court can ever fully resolve.

Of course, respondents cannot deny that the interpretation of the *Tinker* standards has not been completely identical among the circuits. What is significant, however, is that the result in this case would remain unchanged regardless of which circuit's view was applied. Petitioners can point to no case remotely analogous to the one at bar where any federal court has sanctioned the type of censorship which took place here.

The principal case cited by petitioners to support their claim of inter-circuit conflict is *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), which involved the distribution of a sex questionnaire which did not seek to convey information, but to obtain it in a manner which the evidence showed might result in serious psychological injury to some students. No similar risk was present here. In *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981), another case cited by petitioners, the court upheld a school superintendent's decision to cancel a high school's production of the play "Pippin." There, however, the production

was part of the school's curriculum, and the court expressly distinguished the situation from one involving a school newspaper. *Id.* at 216. As previously noted, the Eighth Circuit in this case specifically found that *Spectrum* was not merely a part of the curriculum, but rather a forum for student expression.

If any case is similar to the one at bar, it is *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (E.D.Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). *Gambino* was relied on heavily by the Eighth Circuit in reaching its decision here and can hardly be said to pose a conflict. While the facts and analysis differ somewhat, there is also no conflict with such decisions as *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); and *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D. Ga. 1980). Respondents would surely have prevailed under *Fujima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1971), for that case prohibits any prior restraint. The result reached by the Eighth Circuit is likewise supported by numerous more recent federal appellate decisions which deal with a variety of forums in public schools, including school newspapers. See, e.g., *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D.Me. 1984); *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), *vacated on standing grounds*, ___U.S.___, 106 S.Ct. 1326 (1986); *San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986); and *Searcy v. Crim*, 642 F.Supp. 313 (N.D.Ga. 1986).

Based on present published decisions, the only possible conflict here lies with how a particular court would explain why petitioners' actions violated the First Amendment.

CONCLUSION

Petitioners fear that the Eighth Circuit's decision may inhibit high school journalism programs. What they suggest, however, is that such programs can be saved only if school administrators are given the power to strangle them. Journalism under such circumstances is no journalism at all.

As the Eighth Circuit found, *Spectrum* was intended to be and was operated as a conduit for student viewpoints. Hence, it fell squarely within the protections of the First Amendment. The actions of petitioners in censoring the paper were determined to be completely unjustified. Under these circumstances, the Eighth Circuit correctly held petitioners' actions to be unconstitutional. Its judgment follows established precedent by this Court and is consistent with decisions by other federal appellate courts involving comparable facts. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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REPLY BRIEF

64
No. 86-836

Supreme Court, U.S.

FILED

DEC 31 1986

**JOSEPH F. SPANIOLO,
CLERK**

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

VS.

CATHY KUHLMIEER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

In their Brief in Opposition (hereinafter "Opp."), Respondents contend that this case involves a "relatively straightforward" application of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and that the Eighth Circuit has not "decided a federal question in a way in conflict with applicable decisions of the Court." (Opp. at 2). Yet Respondents, like the Eighth Circuit majority, do not attempt to explain how a school-sponsored newspaper produced by a journalism class under its teacher's supervision can constitute a "public forum" as that concept has been defined in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP*

Legal Defense and Educational Fund, 105 S.Ct. 3439 (1985). Respondents simply dismiss these cases as involving different facts. Every case, of course, involves different facts. The pertinent questions are whether in cases involving school-sponsored forums, the lower courts have applied the same legal principles, and whether those principles conform with prior decisions of this Court. The answers to both questions, as demonstrated in the Petition, are "no".

Respondents baldly assert that all the cited "federal appellate court decisions involving the First Amendment rights of public high school students", "[w]ithout exception," "have recognized . . . that the applicable standards are those established by this court in [*Tinker*]" : i.e., "that student expression may be curtailed only when it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.' " (Opp. 3, 5). In fact, the obverse of that assertion is closer to correct. In a number of First Amendment cases involving high school forums or activities, courts of appeals have cited *Tinker*, but applied either the compelling governmental interest standard or the reasonableness standard that governs nonpublic forums. E.g., *San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986) (compelling governmental interest); *Student Coalition for Peace v. Lower Merion School District Board*, 776 F.2d 431 (3d Cir. 1985) (reasonableness); *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984) (compelling governmental interest), *vacated*, 106 S.Ct. 1326 (1986). In *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977), the Fourth Circuit focused solely on whether the school-sponsored newspaper was a public forum, and in *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981), the Third Circuit's analysis turned on the curricular/non-curricular distinction. In fact, two of the cases relied on by Respondents do not even cite *Tinker*, let alone attempt to apply it. *Searcey v. Crim*, 642 F.Supp. 313 (N.D.Ga. 1986); *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D.Me. 1984).

Other courts confronting analogous situations have elected to apply the material disruption/invasion of rights standard of *Tinker*, but their interpretations have certainly not been, as Respondents grudgingly concede, "completely identical". (Opp. 5). For example, the Ninth Circuit has read the standard narrowly and its interpretation was rejected by this Court in *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986). The Second Circuit has treated the *Tinker* standard as a reasonableness test, e.g., *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) — the same test applied by the district court below and rejected by the Eighth Circuit. The Eighth Circuit's approach is an admixture of all of the above with the public forum determination triggering application of their particular version of the *Tinker* standard. In applying that standard, the court of appeals clearly held "that school officials are justified in limiting student speech, under [the invasion of rights prong of the *Tinker*] standard, *only* when publication of that speech could result in tort liability for the school." (Appendix to Petition for Writ of Certiorari at A-14 (emphasis added)). As the Eighth Circuit implicitly acknowledged, that holding cannot be squared with *Trachtman*, *supra*, or, we submit, *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986). In sum, to use Respondents' terminology, the public school expression area is in "doctrinal disarray" (Opp. 5): there is no agreement among the lower courts on what legal principles govern.

Respondents fault Petitioners for failure to take action less drastic than removal of two pages of *Spectrum*. (Opp. 4). Such criticism, however, presumes that *Spectrum* is a public forum. As this Court observed in *Cornelius*, "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 105 S.Ct. at 3453 (emphasis in original). The district court reviewed Petitioners' actions and concluded those actions were reasonable under the cir-

cumstances. (Appendix to Petition at A-40, A-55). The court of appeals did not find that conclusion “clearly erroneous.”

Indeed, in light of Respondents’ curious adoption of the Eighth Circuit’s opinion “as their statement of the case” (Opp. 1), it warrants emphasis that the court of appeals did not find any of the district court’s detailed findings of fact “clearly erroneous.” Nor did the court of appeals purport to invoke the standard of review discussed in *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984) — even were that standard applicable to a determination of *Spectrum*’s relationship to the curriculum. In fact, on that issue the court of appeals acknowledged that *Spectrum* was “a part of the school adopted curriculum.” (Appendix to Petition at A-9).

Respondents’ insinuation that the Eighth Circuit concluded “petitioners acted merely because certain newspaper stories offended their personal sensibilities” is false. (Opp. 4). The court of appeals never questioned Petitioners’ good faith, but only the legal sufficiency of their articulated reasons. Nor does the record support such a conclusion. For example, as the district court found, *Spectrum* had published articles on teenage pregnancy in the past. (Appendix to Petition at A-28 to A-29). The difference here was the privacy concerns raised by the student profiles. And despite Respondents’ assertion to the contrary (Opp. 4), there was certainly evidence that these materials were inappropriate for a school-sponsored publication given the age and maturity level of its high school audience. (Appendix to Petition at A-45). The court of appeals simply chose to reject the judgment of professional educators.

Respondents’ Brief in Opposition is most significant for what it does not say. Respondents do not assert that this case involves any form of viewpoint discrimination. Therefore, the Court squarely confronts questions of the status under the public forum doctrine of school-sponsored publications produced as part of the curriculum, of the relationship of the public

forum determination to *Tinker*, and of the relevance of *Tinker* in cases that do not involve viewpoint discrimination. Respondents do not have any answer for the practical impediments the Eighth Circuit’s opinion creates for the teaching of journalism and school sponsorship of journalism programs. Respondents apparently view journalism under the supervision of school officials as “no journalism at all” (Opp. 7), even though professional reporters are constantly supervised by editors and publishers. Whatever the ultimate outcome, school authorities need to know the limits of their authority under the First Amendment in administering journalism programs, and this case affords the Court an exceptional opportunity to provide that guidance.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION ~~FILED~~

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No. 86-836

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IN THE
Supreme Court of the United States
October Term, 1986

Hazelwood School District, et al.,
Petitioners,

v.

Cathy Kuhlmeier, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND
BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING THE PETITION
FOR WRIT OF CERTIORARI

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No. 86-836

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

Hazelwood School District, et al.,
Petitioners.

v.

Cathy Kuhlmeier, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF
NATIONAL SCHOOL BOARDS ASSOCIATION
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association
(NSBA) moves this Court for leave to
participate as amicus curiae herein for
the purpose of filing the attached brief.

NSBA is a nonprofit federation of this

nation's forty nine state school boards associations, the Hawaii Board of Education, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and the educational and curriculum standards of the public schools.

The fact situation in this case is not

unique. The policy in Hazelwood School District of operating school newspapers as a part of the journalism curriculum is a common policy throughout the country and is a continuing trend in areas where the policy is not as prevalent. NSBA seeks leave to file the attached brief because the decision in this case will have an impact on school districts throughout the country.

The court below looked on this case as if it were a case of the State attempting to censor a private newspaper. The court discounted educational arguments concerning the need for school administrations to exercise oversight over the curriculum, including school newspapers. NSBA respectfully urges this Court to allow it to provide a brief

overview of those educational arguments.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

National School Boards Association
submits this brief amicus curiae in
support of Petitioners in the above case.
Petitioners have consented to the filing
of this brief but Respondents have not.

Amicus has filed a motion for leave to submit the within brief.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators.

They are responsible under state law for the fiscal management, staffing, continuity, educational and curriculum standards of the public schools.

School boards across this country need guidance from this Court as to the extent of their authority to control school curriculum, particularly newspapers which are operated as a part of the curriculum. Because of the conflicting state of the caselaw on this subject, it is difficult for school boards and professional educators to perform their function of setting educational standards while being "second-guessed" by lower courts.

REASONS FOR GRANTING THE WRIT

1. There is a conflict in the circuits as to the scope of authority which school districts have over school

newspapers which are operated as part of the journalism curriculum.

2. The lower court decision conflicts with this Court's decision in Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

ARGUMENT

I. INTRODUCTION

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation and a healthy competition for education excellence." Milliken v. Bradley, 94 S.Ct. 3112, 3125 (1974).

This Court has held on several occasions that where educational policy is at issue, local priorities and standards should control. San Antonio v. Rodriguez, 93 S.Ct. 1278 (1973). Thus, each state and each local school board, acting for the school district, must determine of what the public education will consist.

The U.S. Congress too has voiced its commitment to local control over curriculum. The most recent expression of that commitment is contained in the Department of Education Organization Act, 20 U.S.C. 3401. That act provides in Section 103:

Sec. 103(a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and

to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the State.

(b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

Every state in the Union guarantees through its Constitution the right of

every child to a free public education. In order to assure that the people in each community have the freedom to decide what type of education will be provided to their children, states have adopted a system which grants ultimate authority over public school management to elected lay school boards at the local level.

Even though the school newspaper in this case was operated as part of the school curriculum, it is treated by the court below as if it were a private newspaper published in the community. But the issue here is not analogous to that involving "free press" rights of private newspapers.

The articles which are the subject of this case were deleted not because the State, acting as a censor, disagreed with its content. The decision made by the

school officials was an educational decision to the effect that the materials were inappropriate in a school-sponsored publication because of the intimate private details set forth in the articles and the fact that the identity of young students was revealed. The soundness of that educational decision is not an issue for the courts.

1. There is a conflict in the circuits as to the scope of authority which school districts have over school newspapers which are produced as part of the journalism curriculum.

As noted by the district court below, there is a conflict in the circuits as to the extent of authority which school districts may exercise over material in school-sponsored newspapers. Appendix to Petition for Writ of Certiorari A-48, A-49.

The cases cannot be harmonized as

they are based on two different theories. The second circuit has upheld the school board's control over the curriculum, including the right to prohibit publication in school-sponsored newspapers of material which is educationally inappropriate given the age of the students. Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977). The fourth circuit theory postulates that where a school district authorizes students to write articles in a school newspaper, it waives its right to complain about the content of an article unless it can be shown to be "disruptive" under the Tinker standard. See, e.g. Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977).

Thus, school boards in the Second Circuit operate under a different constitutional rule than school boards in

the Fourth and Eighth. And, in circuits that have not yet spoken on the issue, school boards operate at their peril.

The need for uniformity in this critical area is clear. It is important for all school boards and their students to know the scope of their rights and responsibilities under the law. School officials should not have to risk the possible liability in suits for damages because the law is unclear.

In 1982 this Court heard the case of Board of Educ. v. Pico, 457 U.S. 853, involving the removal of books from the school library. The plurality decision ruled that school boards may not remove books from the library where motivated by an attempt to prescribe orthodoxy. However, the decision states that the school board "might well defend their

claim of absolute discretion in matters of curriculum by reliance on their duty to inculcate community values (emphasis supplied)." Nevertheless, the number and variety of opinions expressed in Pico has left school boards and their attorneys in a quandary as to the extent of school board discretion under the Constitution as to the substance of the curriculum and curriculum-related materials.

The - Eighth Circuit opinion exacerbated this state of uncertainty by ruling that school officials may limit student speech only when publication of that speech could result in tort liability for the school. In effect, this holding forces school officials to choose between a possible first amendment action brought by student journalists or potential liability for the invasion of privacy of

parties alleging injury from publication of student-written articles.

School districts which provide the educational opportunity for students to write and prepare a school newspaper must be allowed to set their own standards of propriety in determining what to publish so that they may protect themselves from possible tort liability. When a school district sponsors a newspaper in this manner, it is like any other publisher and cannot be expected to give its writers free rein to decide what should appear in print. Obviously, each publisher must decide what risk it wishes to assume in determining what is appropriate for publication; for example, the New York Times has chosen to avoid some of the risks of legal liability which the National Enquirer eagerly embraces.

Likewise, a school district, as publisher, must be able to set its own limitations on the risks to which it wishes to expose itself.

A school district should not be required to forecast whether a court will view a particular student article as entailing potential tort liability before it decides that the article should not appear in a school-sponsored publication. Nor should the fact that the school district chooses to follow a more conservative course in its approval of material for publication, rather than walk the line between tortious invasion of privacy and nontortious reporting, expose it to suits by student-journalists for alleged first amendment violations.

If the Eighth Circuit's restraint on school officials' authority to limit

student speech remains intact, schools that cannot afford the legal fees necessary to defend against claims of constitutional violations on one hand or tort suits for invasion of privacy and that cannot risk possible liability for damages will be forced to consider seriously the elimination of a school-sponsored newspaper. While the school may recognize the educational value of including such a newspaper as part of its journalism curriculum, economic costs may outweigh those benefits. This is especially true in light of the fact that many local school districts are having increasing difficulty in obtaining liability insurance coverage and the cost of the coverage that is available has increased by enormous proportions. Indeed it is not unusual for a school district to

pay more for liability insurance than it pays for textbooks. The liability insurance crisis stems primarily from complex financial problems in the industry which have caused insurance companies to look very closely at public entities.

To gain some sense of the problems faced by school districts in obtaining insurance coverage, amicus conducted a survey of its membership consisting of all of the state school boards associations. The survey results showed that the problem of obtaining adequate insurance at a reasonable price is severe. In a third of the responding states, at least some of the local school districts have been unable to obtain liability insurance during the past year. Those states include Tennessee, Texas, Florida, Virginia, New Mexico, Massachusetts and

New Hampshire. Even in states reporting that liability coverage has been found, several members stated that premium prices doubled or tripled over the last four years. For example in Alaska prices have jumped 200-300%, in Oregon, 300%; in Florida, 100-150%, in Georgia, 100%.

The results of NSBA's survey have been confirmed by other sources. The Attorney General of the State of Idaho, Mr. Jim Jones, recently testified before the United States Senate. He stated:

Due in no small part to the proliferation of Section 1983 and 1988 attorneys fees claims a governmental insurance crisis has been precipitated in Idaho and virtually every other jurisdiction in the country. Governmental entities in Idaho and many other states have recently been informed that they are either not insurable or that continued coverage will entail doubled or tripled premiums.

Testimony of Idaho Attorney Jim Jones,

Constitution Subcommittee of the Judiciary Committee, U.S. Senate, October 3, 1985.

Assuredly, the Eighth Circuit's holding, if allowed to stand, would significantly increase the difficulty already faced by school districts in obtaining coverage. Because it exposes school districts to liability from several angles, companies already leary of providing insurance coverage to school districts will have more incentive to deny coverage completely or else raise premiums above their already outrageously high level.

II. The lower court decision conflicts with this Court's decision in Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

A. The Fraser Court recognized that regulation of speech in school sponsored activities falls

within a school's educational responsibility.

The court below bases its decision on a finding that a school newspaper is a "public forum." Thus, school officials are subjected to a first amendment standard similar to that imposed on the state with regard to private newspapers. Among the cases cited by the court of appeals in support of its public forum holding is Fraser v. Bethel School District No. 403, 755 F.2d 1356 (9th Cir. 1985). That decision held that a school-sponsored assembly was not part of the curriculum and therefore, students were "free to exercise their individual judgments about the content of their speeches." Fraser, 755 F.2d at 1364.

On the same day that the Supreme Court reversed the Fraser ruling relating

to school assemblies, Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159 (1986), the court of appeals rendered its decision in this case. Petitioners motion for rehearing en banc gave the Eighth Circuit the opportunity to correct the conflict between its decision and the decision of the Supreme Court. Nevertheless, the motion was denied.

Although the Court's decision in Fraser does not expressly rest on whether or not the student's expression was made in a "public forum," the language of the decision indicates that the outcome would have been different had Fraser's remarks been outside the school. "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." Fraser, 106 S.Ct. 3159 at

3165. The Court viewed this determination as part of the school's education responsibility.

Both the Ninth Circuit in Fraser and the Eighth Circuit in this case construe "curriculum" narrowly, apparently only to include textbooks. The curriculum is much broader than textbooks and includes a variety of instructional materials such as computer software, interactive video disks, video tapes, films, science lab materials, microforms, photographs, slides, cassettes and school newspapers. These materials are as much a part of the curriculum as textbooks. Hazelwood School District is not unique in its treatment of school newspapers. It is common for schools which offer journalism courses to use the second semester as a "hands on" lab where students write a newspaper under

the guidance of the journalism teacher and distribute it to students. Typically, the journalism course is part of the English curriculum and students are given English credit for completion of the course.

For example, 33 school districts in the Metropolitan St. Louis area are members of an organization called "Sponsors of School Publications." A substantial majority, if not all, of the members of the organization sponsor the school newspaper as part of the journalism curriculum. The writing, editing and publishing of the newspaper in these school districts is as much a part of the English curriculum as a textbook.

What is the educational interest of the school district here? The first responsibility of the teachers and the school administration is education.

Hazelwood has included the newspaper as a part of the curriculum because it is an excellent method of teaching students about the "real world" of journalism. Students are taught, not only writing and editorial skills, but also legal and ethical responsibilities which are known to all responsible journalists.

Many of the students involved in the publication of school newspapers are undoubtedly articulate and thoughtful, but they need the maturity and experience of their teachers and administrators to guide them in making decisions. The responsibility of the school administration is different from that at the college level. Students at this age, however mature they may appear, need supervision and protective authority. The decision below establishing a "hands off"

policy on school newspapers and giving students the final word on what is published, unduly restricts educators from meeting their duty to guide students. Ironically, under this rule the school administration has less authority than the student editor of the newspaper.

In addition to the educational duty to the student journalists, the schools also have a duty to the other students in the school, many of whom are as young as 9th grade, to assure that the school is not sponsoring information which is not appropriate for students of that age.

The lower court was absolutely correct in noting the national problem of teen pregnancy. The problem has reached crisis proportions. Of all births in the U.S. in 1982, 14.2% were to females under 20 years of age. 1.1 million teenagers

became pregnant in 1981, most of them unintentionally. Center for Population Options The Facts: Teenage Sexuality, Pregnancy and Parenthood. One could cite statistics on the problem ad infinitum. And, the only solution is education. In a recent publication, Preventing Adolescent Pregnancy: What Schools Can Do, the Children's Defense League recommends that "schools should move toward timely and accurate presentation of information on sexuality. Parents and community groups need to be involved in the development and review of school-based curricula... Parents, teachers and community group leaders must be offered training in human sexuality." And precisely because the problem is so severe, it would be irresponsible for a school administrator to allow a school-sponsored newspaper to

appear to endorse irresponsible sexual behavior by students. In this context it should be noted that the newspaper's articles on teen pregnancy were not completely suppressed. The administration merely sought to assure that the subject matter was responsibly reported.

The lower court turns this logic upside down by stating that because teen pregnancy is a problem of which students in nearly every high school in the United State are aware, the "articles would not offend their sensibilities." Appendix to Petition for Writ of Certiorari at A-13. It is exactly because teen pregnancy does pose such a serious problem and because students receive inaccurate, unreliable or irresponsible information from a variety of sources outside the schools, that it is particularly important that the

information they get from school-sponsored sources is valid.

As to the privacy interests of the students, that too, is an educational decision not a legal one. Adults who waive their privacy interests by revealing information to a private newspaper must live with whatever consequences result from their revelations. Certainly, many an adult has later wanted to retract statements made in an interview.

But, while students are in the custody of the schools, the school officials have the duty to protect them from such consequences. Students in a high school setting may not have the maturity to understand the potential adverse consequences that flow from making public the most intimate details of their lives.

To be sure, some high school age students may be mature enough to handle the public exposure of personal details about their lives. However, the school officials are in the best position to make that determination, not the courts.

It is also the province of the schools, not the courts, to make determinations as to what is appropriate material to place in the school newspaper.

Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school and the determination of what manner of speech is inappropriate properly rests with the school board. Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159, 3161.

This Court has also noted the differences between the pedagogical models for higher education and elementary and

secondary education. Historically, inculcation of values and "basic skills" are of primary importance at the lower level while a free exchange of differing ideas, a "marketplace of ideas" has been the tradition at the higher education level. Keyisnian v. Board of Regents, 385 U.S. 589, 603 (1967). Parents would indeed have reason to complain if the state required their children to attend the public schools while denying responsibility for what students hear, read and are taught in the classroom and school-sponsored educational activities.

In secondary schools, it is true, the idea of academic freedom may be balanced to a degree by the countervailing interest of states, acting through local school boards, to inculcate basic community values to students who may not be mature enough to deal with academic freedom as understood or practiced at the higher educational level. East

Hartford Education Association v. Board of Education, 562 F.2d 838, 843 (2d Cir. 1977).

Parents, who are required by the state to entrust their children into the care of the public schools, have a right to assume that the community's moral and educational values are observed and reinforced by the schools. Where the educational tool of a school newspaper creates the Scylla of a student lawsuit and the Charybdis of the forfeiture of that parental trust - school boards will simply get out of the water altogether and discontinue school newspapers.

It is the distinct province of the schools, not the courts, to determine what should be officially distributed to students under the aegis of the schools, Fraser, supra. And, it is the province of the schools to develop and interpret

guidelines for the content of the curriculum, including school newspapers. Wood v. Strickland, 420 U.S. 308 (1973) Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

Even the most avid defenders of the first amendment understand the need for different rules in the context of the school. William Safire, commenting on the Fraser case in the New York Times on August 24, 1986 stated:

Although I am a no-law-means-no-law First Amendment freak, I think Burger and Brennan were right to assert the school's right to rule that priapic pretension is out of order in an assembly; it's okay to shut up kids in formal settings when you are not trying to shut down their opinions.

The school administration in this case, like the school board in Fraser, was not attempting to "shut down" the opinions

of the students. This clearly was not a case where school officials attempted to suppress articles in unauthorized "underground" newspapers. In fact, the students in this case were not disciplined for distributing the articles on their own after the school administration removed them from the school newspaper.

B. Lower court's reliance on Tinker is misplaced.

The lower court instead of rehearing the case in light of Fraser, cites Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) in support of its position.

The rules established in Tinker do not apply to the case at bar for two reasons: first, Tinker dealt with political speech rather than privacy rights; and second, the Tinker speech was

not related to any school-sponsored activity, unlike the school-sponsored newspaper here. Both of these factors were crucial to the holding in the case.

In Tinker, this Court emphasized the fact that the school district had not prohibited wearing of all armbands, or of buttons or T-shirts with statements thereon, but had singled out black armbands worn as a symbol of the students' disagreement with the Viet Nam War -- a political statement. Although noting that in general students' first amendment rights in the public school context are not the same as those of adults, the Court held that as to silent political statements, a student's free speech right differs little in the school context than outside the classroom. That form of speech cannot be regulated except as to

"time, place and manner" and so as to prohibit "substantial and material disruption." But, it is silent, political statements to which this standard applies.

Although lower court decisions dealing with political speech of students are quite consistent, they diverge in their application of the "substantial disruption" standard to speech which raises questions of privacy or morality. For example, in Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977) the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey might invade the privacy of younger students, who might not

be mature enough to handle the story's intimate information. That is the same determination which was made by the school administration in this case.

CONCLUSION

Undoubtedly, there are some school boards, principals or teachers who would disagree with the education decisions which were made by the school administration in this case. School districts differ widely across the nation. Some offer life science courses with explicit discussions of human sexuality. Others opt to leave that discussion to the parents. But all school districts are very careful to bring parents into the process of making decisions as to how and what should be taught in sex education classes. Most also give parents the right to deny consent to their children

receiving that education.

Lower courts are in conflict on the question of the application of the First Amendment to curriculum. This Court has not spoken on that subject but has rendered three related decisions on student free speech rights: Tinker v. Des Moines Independent School District, Bethel School District No. 403 v. Fraser and Board of Education v. Pico. Tinker was misapplied by the court below. Fraser was ignored. And, we respectfully submit, Pico is less than helpful as guidance to school boards. School boards across the country need further guidance from this Court in making decisions as to the scope of their discretion in this area. There is a growing trend to establish school newspapers as a part of the journalism course in order to give students a real

world model. The newspaper is much more effective as an educational tool than a mere classroom exercise. However, if teachers and school administrators are restrained by the first amendment from exercising control over what is published, school newspapers may be discontinued -- an unfortunate result.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

10

Supreme Court, U.S.
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No. 86-836

In The
Supreme Court of the United States
October Term, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

CATHY KUHLMEIER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS,
HAZELWOOD SCHOOL DISTRICT, ET AL.**

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CATHY KUHLMEIER, *et al.*,
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On Writ of Certiorari to the
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BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS,
HAZELWOOD SCHOOL DISTRICT, ET AL.

INTERESTS OF AMICUS

This brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties; the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this matter, including *Bethel School District v. Fraser*, 478 U.S. —, 92 L. Ed. 2d 549 (1986). The Foundation's public policy perspective and litigation experience in weighing the rights of individual students against those of school authorities will help provide this Court with additional argument to review the holding of the Eighth Circuit Court of Appeals in this matter.

o

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 795 F.2d 1368 (8th Cir. 1986).

o

STATEMENT OF THE CASE

This case presents the issue of whether a school-sponsored high school newspaper, which is an integral part of the school curriculum, is a "public forum" for purposes of the First Amendment. This case also raises the question of the role courts should maintain in reviewing decisions of school authorities to further educational policies and objectives.

Spectrum is the school newspaper at Hazelwood East High School in St. Louis County, Missouri. The Journalism II class, which produces *Spectrum*, is designed as a classroom laboratory exercise in which students apply their knowledge and skills learned in Journalism I. The teacher has the authority to exercise and does exercise a great deal of control over *Spectrum*, including its contents. Additionally, each issue of the paper is to be submitted to the principal for prepublication review.

In 1983 members of the Journalism II class researched and wrote two articles which were deleted from *Spectrum* by the principal. The first article consisted of separate personal accounts of three Hazelwood East students who became pregnant. Even though pseudonyms were used for the girls in the pregnancy study, the principal believed the girls could be identified from the text. In addition, the principal opposed the discussion about the details of the girls' sex lives and the use or nonuse of birth control methods. The second article involved students' explanations why their parents divorced. One student, identified by name in the article presented to the principal, accused her father of being an alcoholic and of causing the divorce. The principal believed that fairness required the parents

to be notified and given an opportunity to respond to the article. The principal believed that an immediate decision had to be made regarding the articles. Rather than holding up the newspaper, he simply instructed the teacher to have the printer delete the two pages containing those articles. The principal's immediate supervisor concurred in the decision.

When three of the staff members of *Spectrum* filed suit against the school district, the District Court found that deletion of the articles did not violate the students' First Amendment rights. The court held that *Spectrum* was not a "public forum" because it was an integral part of the school curriculum and that the principal had a reasonable basis for his actions. The decision was reversed by a divided Eighth Circuit panel finding that *Spectrum* was a "public forum" and that schools can constitutionally limit student speech only when the publication can result in tort liability for the school.

SUMMARY OF ARGUMENT

The Eighth Circuit's opinion in this case has raised substantial questions regarding the role of school officials in maintaining local control of educational policy through the curriculum, including the inculcation of community values. This case involves the scope and the extent of the right of public school students to speak freely in the school environment in relation to the authority of school officials to make educational decisions about whether particular articles are appropriate for a school-sponsored newspaper.

The legitimate and essential goals of public education are multiple. Public schools do not limit their function to "reading, writing, and arithmetic" but teach community values, including social and moral values. *Bethel School District v. Fraser*, 92 L. Ed. 2d at 557. This unique demand placed on public schools requires the school board to develop a curriculum that reflects fundamental community values. This cannot be done if school authorities are prevented by the courts from exercising curriculum control by deciding what is or is not appropriate in the school setting.

Amicus takes the position that students do have rights which are protected by the Federal Constitution and they do not shed them at the schoolhouse gate. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). However, these rights of students must be balanced against the right—indeed the obligation—of school authorities to administer the school's educational policies and objectives.

Amicus stresses that school administrators and personnel are professionally trained individuals who are competent and dedicated experts in the field of education. The courts lack this special knowledge and should let stand decisions by these experts as to what is and is not required to further the goals of schools unless those decisions clearly abuse students' constitutional rights.

Further, amicus takes the position that a school district's exercise of its editorial control and judgment over a school-sponsored high school newspaper does not violate students' First Amendment rights.

Amicus urges this Court to reverse the Eighth Circuit's opinion which places a straitjacket on school officials and adopt instead a standard of reasonableness for reviewing the actions of school authorities.

ARGUMENT

I

THE NEEDS OF THE EDUCATION PROCESS LIMIT STUDENTS' RIGHT OF FREE SPEECH

A. Students' First Amendment Rights Must Be Viewed in Light of the Special Characteristics of the Public School Environment

This case examines the scope and extent of the right of public school students to speak freely in the school environment in relation to the authority of school officials to make educational decisions about whether particular articles are appropriate for a newspaper sponsored by the school. This Court has recognized that local school boards have broad discretion in the management of school affairs, but this discretion must be "exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 864 (1982). While the role of the First Amendment is to foster individual self-expression, all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker v. Des*

Moines Independent Community School District, 393 U.S. at 506. The unique demands placed on public schools require a showing that basic First Amendment freedoms are "directly" and "sharply" implicated prior to judicial intervention in the operation of the public schools. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This Court has also recognized that primary and secondary public schools not only provide academic instruction, but also socialize children for participation in our society through the inculcation of community values. In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), this Court stated that public schools are vitally important "in the preparation of individuals for participation as citizens" and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." This was recently reaffirmed in *Bethel School District v. Fraser*, 92 L. Ed. 2d at 557.

This Court has noted

"that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Board of Education v. Pico*, 457 U.S. at 864.

To maintain an environment in which learning and socialization processes may occur, local school boards and school administrators must be entrusted with broad discretionary authority. See *New Jersey v. T.L.O.*, 469 U.S. —, 83 L. Ed. 2d 720, 735 (1985); *Goss v. Lopez*, 419 U.S. 565, 580 (1975). To further educational goals and objectives,

this Court has acknowledged that the First Amendment does not prevent school officials from determining what type of speech would undermine the school's basic educational mission. *Bethel School District v. Fraser*, 92 L. Ed. 2d at 560.

Finally, most public schools have a locally elected board and professional educators to determine educational policy, including the curriculum. The curriculum is developed through a process that necessarily reflects and transmits local values. *Pico*, 457 U.S. at 891-92 (Burger, C.J., dissenting); *id.* at 894-97 (Powell, J., dissenting); *Ingraham v. Wright*, 430 U.S. 651, 670-72 (1977). To avoid a national educational policy on curriculum, plaintiffs' First Amendment claims must be evaluated in light of the need for substantial judicial deference to decisions of school authorities to maintain a sound educational environment.

B. The Eighth Circuit Misapplied Tinker and the "Public Forum" Doctrine

The majority opinion in the Eighth Circuit, however, ignored the district's interests in maintaining an educational environment compatible with community values. First, relying on *Tinker*, the majority held that the district was powerless to exercise its editorial control absent a showing that it was "necessary to avoid material and substantial interference with school work or discipline or the rights of others." *Kuhlmeier v. Hazelwood School District*, 795 F.2d at 1374. To meet the Circuit Court's "invasion of the rights of others" test, the student's action

must result in tort liability for the school. *Id.* at 1375. Second, it treated the school-sponsored newspaper as a traditional "public forum" for First Amendment purposes. Neither *Tinker* nor this Court's "public forum" doctrine warrants these holdings.

1. The Tinker Standard Does Not Apply

Tinker was a case of unconstitutional suppression of viewpoint. Several students were suspended for wearing black arm bands symbolizing their opposition to the United States' involvement in Vietnam. The arm bands were neither offensive nor controversial for any reason other than disagreement with the political viewpoint they symbolically conveyed. Additionally, the decision to wear the arm bands was not related to any school-sponsored activity—it was a political statement. The school's discipline was motivated by disapproval of the students' opinions on the war and the action discriminated against this viewpoint by permitting other forms of symbolic expression, such as the wearing of political campaign buttons or the "Iron Cross." *Tinker*, 393 U.S. at 509-11. The students in *Tinker*, therefore, established a First Amendment violation because the decisive factor for the school officials' action was an intent to suppress the students' viewpoint on a political issue. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49 n.9 (1983); *id.* at 58 (Brennan, J., dissenting).

In *Bethel School District v. Fraser*, this Court distinguished the "political" message of the arm bands in *Tinker* and the nominating speech given by Fraser at a school-sponsored assembly. The Court stated:

“In upholding the students’ right to engage in a non-disruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did ‘not concern speech or action that intrudes upon the work of the schools or the rights of other students.’ ” *Bethel*, 92 L. Ed. 2d at 556-57.

The Eighth Circuit, however, did not make this distinction.

An examination of this case reveals no evidence that the pages were removed from the newspaper because the school officials disagreed with the viewpoint. On the contrary, several copies of the articles were photocopied and circulated among the students after the newspaper was printed and distributed. There was no effort on the part of the school officials to stop the circulation of the articles or to punish the students who circulated them. These stories were removed from *Spectrum* only because the principal had a legitimate concern that the three girls featured in the pregnancy article could be identified given the specific information described in the article and that there were only 8 to 10 pregnant students at Hazelwood East. Similarly, the divorce article dealt with students’ perceptions of the reasons for their parents’ divorce without allowing the parents an opportunity to respond to the article. Where school authorities delete articles without regard to any viewpoint expressed, the *Tinker* standard is inapplicable. Further, the speech in *Tinker* was not related to any school-sponsored activity. Unlike *Tinker*’s arm band, *Spectrum* was an integral part of the school curriculum. Both of these factors were crucial to the holding in *Tinker* and since those factors are absent here the *Tinker* standard is inapplicable.

2. Hazelwood East Has Not Created a Forum of Unlimited Student Expression in *Spectrum*

Also underlying the Eighth Circuit’s analysis of plaintiffs’ First Amendment rights was the erroneous assumption that the school-sponsored newspaper was a traditional public forum for First Amendment purposes. *Kuhlmeier*, 795 F.2d at 1372.

This Court has adopted a forum analysis as a means of determining when the government’s interest in limiting the use of its property or facilities to some intended purpose outweighs the interest of those wishing to use it for other purposes. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. —, 87 L. Ed. 2d 567 (1985). This Court has recognized three categories of First Amendment fora: (1) the traditional public forum; (2) the limited public forum; and (3) the nonpublic forum. *Id.* at 579-80; *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. at 45-46.

The Eighth Circuit held that *Spectrum* was a public forum “because it was intended to be and operated as a conduit for student viewpoint.” *Kuhlmeier*, 795 F.2d at 1372. Contrary to that decision, Hazelwood East’s school-sponsored newspaper was neither an open public forum nor a limited public forum, but a nonpublic educational activity. Although it provided certain students an opportunity to publish articles written in Journalism II, “[n]ot every instrumentality used for communication . . . is a traditional public forum or a public forum by designation.” *Cornelius*, 87 L. Ed. 2d at 580; *United States*

Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 130 n.6 (1981).

Spectrum was an integral part of the school curriculum. It was designed as a laboratory exercise for the Journalism II class. The preparation of *Spectrum* was largely done during class. The students used a textbook. Additionally, they received academic credit and a grade. The teacher selected the editorial staff, set the size and date of issues, assigned stories, critiqued and required modification of drafts, and edited the stories. The teacher decided which articles prepared in the Journalism II class would be published. Clearly, the teacher was the final authority with respect to almost every aspect of the production of *Spectrum*, including its content. Additionally, each issue of the paper was required to be submitted to the principal for prepublication review. These characteristics of the school-sponsored newspaper, like most aspects of a public school's educational program, bear no resemblance to recognized First Amendment public fora. *Cornelius*, 87 L. Ed. 2d at 594 n.3 (Blackmun, J., dissenting).

Under this Court's analysis, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 87 L. Ed. 2d at 582. It follows that government has the right to exercise control over access to a forum that has been established for a particular purpose. *Cornelius*, 87 L. Ed. 2d at 582; *Perry*, 460 U.S. at 46. As discussed below, a close examination of the educational interests implicated by these articles

reveal that the district's viewpoint neutral action was reasonable in light of surrounding circumstances and was necessary to further the compelling state interest of the educational process.

C. Courts Should Not Interfere in Daily School Operations Absent an Abuse of Basic Constitutional Rights

It must be recognized that a student is subject to far more stringent regulations than an adult outside a school environment. This Court stated in *Ginsberg v. State of New York*, 390 U.S. 629, 638 (1968), "where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .'" This includes students' First Amendment guarantees.

This Court stated in *Bethel*:

"The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.*, 469 U.S. 325 . . . (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel*, 92 L. Ed. 2d at 558.

This Court has consistently held that where educational policy is at issue, local priorities and standards should control. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Thus, each state and

each local school board, acting for the school district, must determine its educational policies. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. at 104.

In approaching this subject it must be recognized that school administrators and personnel are professionally trained individuals who are experts in the field of education. Because judges lack such expertise, in the absence of very clear abuse by school authorities bordering on capriciousness, arbitrariness, or bad faith, the courts should let stand these administrative decisions as to what is required in the day-to-day operation of the school. "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). A court may disagree with the judgment of school officials, but such disapproval provides no license or authorization to usurp the school officials' authority by substituting the court's judgment for that of the school.

Here, the decision made by the school authorities to delete the articles was an educational decision to the effect that the materials were inappropriate in a school-sponsored publication. The principal had a legitimate concern that the intimate private details set forth in the articles could reveal the identity of the young students. The principal also had a legitimate concern that some of the material was not appropriate for some high school age readers and

might create the impression that the school district endorsed the sexual norms of the article's subjects. Similarly, the principal had reasonable objections to the divorce article because it related students' perceptions of the reasons for their parents' divorce without allowing the parents an opportunity to respond to the article. The soundness of that educational decision is not an issue for the courts.

In *Bethel School District v. Fraser*, this Court stated: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 92 L. Ed. 2d at 558. And, in *Board of Education v. Pico*, 457 U.S. 853, this Court recognized that even in a school library, school authorities have the discretion to remove inappropriate books provided that the motivating factor is neither the purposeful suppression of ideas, *id.* at 871-72 (plurality opinion), *id.* at 879-81 (Blackmun, J., concurring), nor the selection of a particular viewpoint for prohibition, *id.* at 918-20 (Rehnquist, J., dissenting). The viewpoint neutral actions of the school authorities to delete these articles from the school-sponsored newspaper were constitutionally permissible given the highly personal and sensitive topic of these articles and the obvious educational concern on the part of the school to protect these students and the school.

D. The District Had an Important Interest in Avoiding the Impression That It Approved the Viewpoints Expressed in the Articles

The district's actions were necessary to dispel any impression among students and parents that it approved of the content of those articles. A public school has an "important interest in avoiding the impression that it has

endorsed a viewpoint at variance with its educational program." *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981).

Additionally, the parents of the students have a right to expect that the school will not sponsor publications that implicate serious privacy issues, such as pregnancy and divorce—without assuring that the information is educationally valid and portrayed in an appropriate light.

Based on the potentially harmful effect of these articles on the students and the district's need to remove an imprimatur of official tolerance, the district promoted its public educational policy by deleting these articles from *Spectrum*.

Indeed, the presentation of material determined by the school authorities to be unsuitable for the students because of the sexual nature of the articles has support in this Court. In *Bethel*, Fraser gave a speech using thinly veiled sexual allusions to gain the attention of the student audience at a school-sponsored assembly. This Court found that it was appropriate for the school to disassociate itself from the impression that it endorsed the content of Fraser's speech because it was inconsistent with fundamental educational policies. 92 L. Ed. 2d at 560.

Also in *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1977), the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The court found that within the public school environment, the varying ages and levels of maturity of school children and the diversity of parental attitudes and expectations for

their children concerning sexuality create a strong educational interest in presenting sexual matters in a responsible manner. The presentation of this topic in an irresponsible fashion can have serious and permanent harmful effects on adolescents. *Trachtman*, 563 F.2d at 519-20.

And, in *Seyfried v. Walton*, 668 F.2d 214, the District Court affirmed the superintendent's decision to cancel the musical "Pippin" as inappropriate for school sponsorship did not offend the students' First Amendment rights. In affirming the lower court's decision, the court determined that the critical factor was the relationship of the play to the school curriculum. The court found that the play was an integral part of the school's educational program and a student has no First Amendment right to participate in any particular course of study. *Seyfried*, 668 F.2d at 216.

Students at Hazelwood East do not have a First Amendment right to study any subject they desire. Nor, is there a First Amendment right to demand the publication of a particular article. The selection of the curriculum is best left to the expertise of educators.

II

THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO SCHOOL-SPONSORED NEWSPAPERS

A basic contention of plaintiffs is that a school-sponsored newspaper is a public forum and the school must allow all students to present their ideas in *Spectrum*. According to this argument, a school would not be able to exercise its discretion to reject an article because the subject matter is inappropriate and not suitable for publication.

Spectrum is part of the educational program at Hazelwood East High School for its journalism students. Even though much of the editorial work is done by students, it is done under the guidance of a teacher. The teacher exercises a great deal of control over content by deciding what articles prepared in the Journalism II class will be published. This screening and selective process requires the exercise of opinion as to what particular articles should or should not be published.

Plaintiffs seem to feel that the personal anecdotal articles on divorce and pregnancy should be published regardless of the opinion of the school officials. In this respect, the students are seeking to intrude their opinion upon the educational judgment of the school authorities.

Here, the principal's actions were reasonable. The articles were deleted to protect the privacy of the students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, and to ensure fairness to the divorced parents whose actions were characterized. Additionally, the principal was under the impression that an immediate decision had to be made. Rather than holding up the newspaper, he simply instructed the teacher to have the printer delete the two pages containing those articles. Under these circumstances, the school authority's actions were reasonable.

The right to freedom of speech does not open every avenue of communication to anyone who desires to use a particular outlet for expression. On the contrary, each outlet presents its own peculiar problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952). Nor does freedom of speech include the right to speak on any subject,

in any manner, at any time. Cf. *Bethel School District v. Fraser*, 92 L. Ed. 2d at 549. As stated in *McIntire v. William Penn Broadcasting Company of Philadelphia*, 151 F.2d 597, 600-01 (3d Cir. 1945), "[t]rue, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum."

Students do not have the right to commandeer a school-sponsored newspaper for the publication of their articles to the exclusion of opinion of the school authorities who deem the articles inappropriate. On the contrary, the acceptance or rejection of articles submitted for publication in a school-sponsored newspaper necessarily involves the exercise of editorial judgment. A decision to delete an article is no less editorial in nature than an initial decision to publish an article.

As this Court stated in *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974):

"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258.

Additionally, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring), Justice Stewart noted:

"Government is not restrained by the First Amendment from controlling its own expression"

'The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.' "

A finding by this Court that *Spectrum* is a public forum would result in the erosion of the journalistic discretion exercised by school authorities over a school-sponsored newspaper. It would transfer control from the school authorities who are accountable for educational policies and objectives and make it subordinate to student whim.

As this Court stated in *Bethel*:

"Justice Black, dissenting in *Tinker*, made a point that is especially relevant in this case: 'I wish therefore, . . . to disclaim any purpose . . . to hold that the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students.' " *Id.* at 560.

It is clear that a school-sponsored newspaper is not a public forum. Students have no First Amendment right to compel a school to publish any particular article. The school must exercise its editorial discretion in light of the special characteristics of the school environment.

III

A REASONABLENESS STANDARD MUST APPLY TO DECISIONS OF SCHOOL AUTHORITIES

In *New Jersey v. T.L.O.*, 495 U.S. 325, this Court stated: "Today's public school officials do not merely

exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336. This Court stressed the need to balance the students' legitimate expectation of privacy guaranteed by the Fourth Amendment on one side against the "need for effective methods to deal with breaches of public disorder" on the other side. In *Bethel*, 92 L. Ed. 2d 549, this Court took the position that students' First Amendment rights "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 557.

Amicus urges that a standard of reasonableness should apply to decisions of school administrators. This Court should not require school officials to demonstrate that the deletion of an article from a school-sponsored newspaper was necessary to effectuate a compelling state interest, but rather only that the action was reasonable in light of the special characteristics of the school environment. School officials in the public school setting should be accorded wide latitude over decisions affecting the manner in which they educate students. This substantial public interest must be balanced against the students' guarantee of free speech.

The standard required by the Eighth Circuit is unworkable. It leaves school officials helpless in such cases to protect privacy rights unless the student expression would give rise to legal liability. Requiring school officials to make highly technical and potentially costly legal judgments about tort liability and the limits of First Amendment protections will chill the exercise of educational judgment. It is urged by amicus that the rigid standard

required by the Eighth Circuit be replaced by a standard of reasonableness.

— 0 —

CONCLUSION

In the First Amendment context, students retain those rights that are not inconsistent with their status as students or with the legitimate educational objectives of the school system. Any challenge to a student's First Amendment interest must be analyzed in terms of the legitimate policies and goals of the educational system. These conflicting needs have to be balanced and a standard of reasonableness established.

When school administrators and teaching experts are required to exercise their discretion regarding whether an article is appropriate for publication in a school-sponsored newspaper, the academic system will be served if our school officials are allowed to discharge their "important, delicate, and highly discretionary functions," *Tinker*, 393 U.S. at 507, within the limits and constraints of the Federal Constitution.

This decision could affect student publications in more than 800 public schools in California alone and more than 19,000 nationwide. Amicus urges this Court to reverse the Eighth Circuit's decision which places a straitjacket on

school officials and adopt instead a standard of reasonableness for determining the actions of school officials.

DATED: March, 1987.

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JOINT APPENDIX

6
No. 86-836

Supreme Court, U.S.
FILED

MAR 30 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

CATHY KUHLMEIER, *et al.*,

Respondents.

JOINT APPENDIX

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The following opinion, judgment, orders and memorandum opinion have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Eighth Circuit, dated July 7, 1986	A-1
Order of the United States Court of Appeals for the Eighth Circuit Denying Petition For Rehearing, dated August 27, 1986	A-21
Order and Judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, dated May 9, 1985	A-22
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JOINT APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2039C(1)

Cathy Kuhlmeier, *et al.*,
Plaintiffs,

vs.

Hazelwood School District, *et al.*,
Defendants.

RELEVANT DOCKET ENTRIES

8/19/83	Complaint, filed, three counts 10 summons issued.
7/19/84	First Amended Complaint filed by plaintiff.

- 10/12/83 Answer and Affirmative Defenses to Plaintiff's First Amended Complaint filed by Defendants. Leave to file granted.
- 11/26/84 Parties present for non-jury trial — ordered that joint stipulation of facts filed 8/7/84 be made part of this record; motion of plaintiffs to exclude testimony of expert witness filed and denied; plaintiffs' evidence commenced but not concluded; proceedings postponed until tomorrow at 10:00 a.m. (plaintiffs' motions to introduce exhibits, defendants admissions and answers to interrogatories submitted to Judge Nangle).
- 11/27/84 Parties present for non-jury trial (second day) — plaintiffs' evidence resumed and concluded; oral motion of all defendants for directed verdict at close of plaintiffs' case, made, argued and is taken with the case; motion of plaintiffs to introduce evidence, filed and granted; defendants evidence commenced, but not concluded; proceedings postponed until tomorrow at 10:30 a.m.
- 11/28/84 Parties present for non-jury trial (third day) — defendants evidence resumed and concluded; (plaintiffs file additional exhibits and returns of service on subpoenas); plaintiffs and defendants granted until 12/28/84 to file briefs and proposed findings of fact and conclusions of law, at which time cause will be taken under submission.
- 5/9/85 Order and Memorandum filed — IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants did not violate plaintiffs' first amendment rights when they deleted several articles from the May 13, 1983 issue of *Spectrum*, the official

- school-sponsored newspaper of Hazelwood East High School. Accordingly, judgment is entered for defendants on plaintiffs' complaint.
- 5/13/85 Notice of Appeal filed by plaintiffs. File fee paid.
- 7/7/86 Opinion of United States Court of Appeals for the Eighth Circuit filed.

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1-2

Portion Of Exhibit A (page 5) Obscured By Silhouette

At first both families were disappointed, but the third or fourth month, when the baby started to kick and move around, my boyfriend and I felt like expecting parents and we were very excited!

My parents really like my boyfriend. At first we all felt sort of uncomfortable around each other. Now my boyfriend supports our baby totally (except for housing) and my parents know he really does love us, so they're happy. After I graduate next year, we're getting married.

I can talk to my mother about anything but I could not face her and tell her I was pregnant. I never thought it could happen to me.

My boyfriend and I have a beautiful relationship and it's been that way ever since three years ago. Therefore, I really do think that the future looks good for baby Steven.

Steven takes care of my baby. We have a bank account for him (baby) and while he's away at school I get money out as I need it.

I want to say to others that it isn't easy and it takes a strong, willing person to handle it because it does mean giving up a lot of things. secondly, if you're not willing to give your child all the love and affection around, you can't be a good parent. Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

This experience has made me a more responsible person. I feel that now I am a woman. If I could go back to last year, I would not get pregnant, but I

have no regrets. We love our baby more than anything in the world (my boyfriend and I) because we created him! How could we fml love him??? ... he's so cute and innocent...

Julie:

At first I was shocked. You always think "It won't happen to me". I was also scared because I did not know how everyone was going to handle it. But the, I started getting excited.

There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything.

I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it. Greg and I did not get married. We figured that those were not the best circumstances, so we decided to wait and see how things go. We are still planning on getting married when we are financially ready. I also am planning on going to college at least part time.

My parents have been great. They could not have been more supportive and helpful. They are doing everything they can for us and enjoy being "grandma and grandpa". They have also made it clear it was my responsibility.

My parents (especially my mom) are willing to talk about sex, but I always feel very uncomfortable. I guess you never think about your parents doing things like that. An older

Spectrwm



Volume 8, No. 10

MacArthur East High School, 11200 Dawn Road, St. Louis, Mo. 63138

25 cents

May 13, 1983

Anzalone and Beavers voted Prom royalty

by Mary Williams

"I was stunned when I heard my name called. Although I was nervous and I forgot what to do, it felt great to be queen," said Jeanne Beavers, junior, the new Prom queen.

Prom king Gary Anzalone, junior, said, "I was happy to be king, but I felt kind of embarrassed I was glad to see that Jeanne was queen."

Despite the rain, Prom 1983 was "fantastic" according to Keith Sanders, junior class president.

Dave Staton, junior, said, "I

thought the junior class and the sponsors put on a great show. Everything went smoothly and even the food was great."

All comments on prom were not favorable, however. For example, Julie Adams, senior, said, "I think this was the first year that the food (Staton) was awful—the mellow."

Due to comments and criticism received by the junior class sponsors, Mrs. Ann DePron, junior class sponsor, said that next year there will be a few changes. First of all, there will be a different band. Second, there will be more



PROM KING—Gary Anzalone, junior, after being named 1983 Prom King, assumes his honored position in the court.

photo by Brian



NEW ROYALTY—Juniors Jeanne Beavers and Gary Anzalone.

After being named 1983 Prom Queen and King along with rethling royalty leaders Peggy Kach and Matt Gentry.

photo by Brian

ELEGANT EATERS? Kim Roberts, Junior, and Freddie Quinn, Junior are served food from the buffet which was provided at prom.

photo by Brian

CLASSY DANCERS—Elegant, dressed students enjoy the music provided by Slash.

photo by Brian



SPARKLING STAR—1983 Prom Queen Jeanne Beavers, junior, smiles for pictures prior to the queen's dance.

photo by Brian



Season to open for job hunters

by Angeline Skarup

For many job hunters, the missing of summer signals the start of the hunting season. For students and faculty, the yearning for extra income begins to bud with warm weather. When the warm summer months go away, students and faculty pack away this temporary job and return to the routine of school.

Just what is at the root of this growing need for a temporary occupation? Teresa Bush, junior, explained, "I need to save money for college and other things I am going to need for my future career."

Mr. Alan Buxbaum, English teacher, joked, "It keeps me out of trouble."

Susan Voss, junior, revealed, "I want to save money to get a nice car."

Still, the most basic reason for searching for a temporary job was summed up in one word by Mr. Graham Weir, English teacher, when he stated, "Money."

When is the best time for a job hunter to start the hunt? Teresa Bush, junior, said, "The best time to look for a job is in May, when some of the seniors decide to go to some summer college to get the basics in. While they're doing that, your chances for finding a job are better."

However, Lisa Lind, senior, disagreed. "I think since all the college students come home they get their old jobs back for the summer."

Miss Mary Landy, English teacher, starts her year with a bit earlier. "Usually, March is always a time for me to think about summer work," she said.

Mr. Fred Davis, counselor, is currently in the business of helping these students who are seeking a summer job. "A lot of these jobs may be centered in one place. For example, Six Flags has 2,000 openings," he said. "There are jobs available if you want them bad enough," he added.

These summer jobs can vary greatly from person to person. Mr. Weir admitted to having a green thumb when he said, "I've been a gardener for the past six years."

Miss Landy said that the works at Casual Corner, a woman's clothing store.

However, some teachers stay at East throughout the hot summer months. "I teach summer school right here," Mr. Buxbaum stated.

Working at a summer job is advantageous in more ways than one. Personal satisfaction from working can equal—and sometimes even surpass—the actual amount of money derived from a paycheck. Miss Landy agreed by saying, "Summer jobs

are great because they provide a routine which helps one feel productive." She went on to say, "I consider myself lucky because I really like what I am doing."

Despite this, there are those who will not get to experience this personal satisfaction, as obtaining a job can be quite difficult. Experience is the key ingredient needed to unlock the door to a new job. Being a fresh, inexperienced face in the race for occupations can be a huge hurdle. The state of the economy can also take some of the blame for the inavailability of jobs—but only for high school students, but for everyone in general. Mr. Buxbaum declared, "There probably won't be as many summer jobs as in previous years because the economy is tight and there just aren't as many jobs available."

Those who already have summer jobs are very fortunate. Mr. Buxbaum observed, "It would be hard to get one if I didn't already have one."

Teresa noted, "Jobs are tough to find, and you've got to make the best with what you've got." She went on, "People try to tell you that we will have plenty of jobs soon and the recession is ending, but they're only fooling you and themselves. We have to live with this fact and deal with it, because after all, aren't we the future?"

Summer plans to include an assortment of events

by Michelle Byram

When school lets out and summer vacation begins, people have many different plans for their spare time. These plans differ from working a part time job to going to Florida. "I want to have a very exciting summer here with all my friends before I go away to college," said Julie Adams, senior.

Danica Viehmyer, junior, plans to get a full time job as a lifeguard. She also said, "I'm looking forward to laying out in the sun." Summer vacation is also a time for visiting distant relatives. Miss Teri Gaby, math teacher, plans to visit her parents in Chicago.

Summer is not always a vacation as in the case of Miss Debbie Falkner. She plans on going to graduate school to get her Masters in Education Administration/Secondary Level. She plans to attend Kirkville for ten weeks. "After spending the summer in Kirkville, I'm going to deserve a vacation," added Miss Falkner.

"I'm planning on playing baseball and working at Twellman's over the summer," said Steve Rango, sophomore. Other students also plan to work over the summer. A few of the common part-time jobs are held at Naugle's, York Steak House, Bopp's and McDonald's.

"Over the summer my friends and I plan to run to stay in shape for cross country," said Mark Taylor, sophomore.

Tina Toarnina, junior, agreed with Mark. "I plan on staying in shape over the summer by walking or riding my bike home from cheerleading practice three times a week."

Other students also plan to go to graduation parties, such as Rich Luptowski, junior. "I plan to compare these graduation get togethers of '83 to the harem of '84."

"The first two weeks of summer I'm going to recuperate from the graduation parties, then I'm going to look for a job," said Greg Cromeens, senior.



Editorial

Proposal to lower youth wages deserves rejection by Congress

In Jan. 1982, President Ronald Reagan proposed, in his State of the Union Message, a lowering of the student minimum wage.

His proposal would lower the minimum wage from \$2.35 per hour to \$2.00 per hour from May 1 to Sept. 30 and be applicable only to persons 18 or under. His purpose is to give more youths an opportunity for summer employment and to stimulate the barrier that the adult minimum wage has created for youths.

However, we, the Spectrum staff, hold a position in line with the labor unions who feel that this proposal would allow employers to replace older workers with youths at lower wages.

We feel that the employers could take advantage of the proposal, if passed, by firing the older workers and hiring younger ones in their places. In addition, the quality of workers would decrease because of the constant hiring of younger workers.

Younger workers should not be deprived of the full rights available to adult workers. If a younger person is willing to take on the responsibility of a job and does it well, then he should receive the same wages as older workers.

The teenage years are a very expensive time of life. With automobiles, insurance, school and college costs and leisure activities, job income can disappear quickly. In our opinion, we feel that many younger people feel that it isn't worth working for a lower wage.

Our opinion seems to be in agreement with Congress' action in 1977 when a similar proposal was rejected. We feel that the same action should be taken this year if the proposal does reach Congress.

News Briefs

- The Spring Sports Banquet will be held from 6:30-9 p.m. on Tuesday, May 24, in the Commons. Tickets will be on sale for \$2.50 in the activities office 3 weeks before the banquet.
- The First Arts Banquet will be held from 8:15-9 p.m. on Thursday, May 26, in the Commons. Tickets may be bought in the activities office for \$2.50 a week before the banquet.
- Students interested in trying out for Show Choir should meet after school from Monday, May 23, Wednesday, May 25, in the auditorium.
- The Student Council election packets for all positions are available from April 18-22 in the activities office from Mrs. Wiley.
- The Student Council election will be held from second and third hour on Friday, April 20, in the auditorium. Juniors will be let out of class during first hour, sophomores during second hour.
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Spectrum

Editor-in-Chief	Bill Becker	Sports Editor	Dennis Lloyd
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	Heaven Staff	Adrian	Adrian
	Heaven Staff	Mr. Robert George	Mr. Robert George

Spectrum is published approximately every three weeks by students in the Journalism II class and printed by Monongah Printing Company in Rockwood, Missouri.

Spectrum maintains a price of 25 cents per issue. Spectrums will be sold during school hours at a time to be announced prior to its release.

Spectrum encourages all students, faculty and community input. Letters-to-the-editor should be under 100 words and signed by the author. Letters should be submitted to room 314 in the SAC room.

Spectrum is a member of the Columbia Scholastic Press Association, the Missouri Journalism Scholastic Press Association and the National Scholastic Press Association. Spectrum earned First Honor in the 1982 NSTA Polling.

Letter to the Editor

I would like to see an article concerning the unfairness of drill team and cheerleading tryouts in the Spectrum. It is a subject I personally feel very strongly about and I think that others should be informed of it.

There are many policies in this area that need to be changed. There should be impartial judges, people who don't know those trying out or care to. This way, people would be chosen on the basis of their ability.

The next would be to get the

Editor's Note
Mrs. Peggy Peterson, drill team sponsor, replied, "How can you be more impartial in final cuts than having judges that are not in school here? The judges are ex-drill team officers from years past who know the style of drill team and therefore know what to look for."

Mr. Tom Gaby, cheerleading sponsor, replied, "I think the judges are as impartial as they can be although they may know some of the people trying out. Cheerleaders have guidelines to follow and, at this school, the rules are enforced."

At the Movies

John Dugan (PG) is a terrific movie about an ex-con who drops in on his daughter who he abandoned 20 years ago. Jason Robards plays this ex-con who is running from the law and some things from Las Vegas. He is also dying. Before he kicks off he wants his daughter and grandson to have the money that he has embezzled from the shop. At first his daughter, played by Marcia Mason, doesn't want anything from her dad but later on she accepts it to make him happy.

This is a Walt Disney type movie but it is fun. I recommended seeing this movie. Now showing at Grandview *** (Linda Smart)

Lone Wolf McQuade (PG) is a good, but not the best karate movie. It stars the karate expert Chuck Norris as J. McQuade, a Texas Ranger who has a "tough" attitude about life, as well as the law. The movie revolves around the whole idea of Norris' decision to travel to Mexico to shut down a stolen arms ring—all by himself, with a little help from his friends: machine guns and band grenades. Norris faces another karate expert, David Carradine as the leader of the ring. The action in this movie is good, however, there is no real plot but few movies like this don't believe in plot. Now showing at the Halls Ferry & **** (Linda Smart)

Several Hazelwood East Journalism students attended the Missouri Journalism Awards Day at the University of Missouri-Columbia on April 18.

The students left with 10 awards—six for the yearbook, the *Pegasus*, and four for the newspaper, the *Spectrum*. The *Spectrum* also received first honors in Missouri's with a score of 82 out of a possible 100, as judged by the Missouri Intercollegiate Press Association.

The students who won yearbook awards were Kathy Huchally, senior, honorable mentions for storm on public affection and the Alpha Theta, a third place with Bob Mitchell, senior, for an original layout. Sue Lee, senior, a third place for opening section must copy. Mike McLean, senior, a third place for sportswriting, and Greg Johnson, junior, a third place for color photography.

by Steve Brink

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East journalists take 10 awards

"I felt privileged to receive an award because this is my first year in journalism," said Greg.

About her three awards, Kathy said, "I was glad they brought my total to six and I was proud of that."

She won three awards last year on the *Spectrum* staff.

Newspaper award winners were: Karen McIntosh, senior, an honorable mention for a story on sexism in sports and a first place with Mike Sykula, junior, for a sports column on weight line dangers in wrestling. Sue Lee, an honorable mention for a feature story on Mr. Richard Eckhardt's dress-up day; and Bill Weber, senior, a second place for a photo of Chris Benton joining running.

Karen said, "I felt that the story on sexism in sports was pretty good—more controversial than the other one (sports column). I really enjoyed writing it."

Your Turn

Since summer employment is rapidly approaching, how do you feel about President Reagan's proposal to lower the minimum wage for youths to \$2.50?

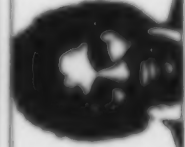
It's a waste of time to work for less than today's minimum wage. —Randie Ham (12)

\$2.50 an hour doesn't go as far as \$3.35 an hour in today's economy.

—Elizabeth Bayle (12)

I think it stinks. Even with \$3.35 an hour, it's hard to make it, especially with a car, if your parents can't help.

—Dwaine Reynolds (12)



pe mind
Lulu front

Fifties fashions and styles return

By Joe Mumbach
Is it 1983 or 1957? This is the question lately. As the saying goes, "History is bound to repeat itself" and so far that saying is true, even today.

The history that is repeating is the golden years of the 1950's. Fifties music, dress and overall styles are returning. Mr. Alan Bushum, English teacher, explains, "They are returning in many ways, such as music like the Stray Cats and the dries. The main thing I remember from the 50's is probably the early rock in American Bandstand. Bands like Danny and the Juniors and Jerry Lee Lewis."

These bands and many others were popular in the 50's because of their styles. It was a style that was easy to move or dance to. The modern day new wave music follows this same style.

Television first became popular in the 50's. According to Time-Life books, by 1953, 30 million people owned sets and junior high

students spent close to 30 hours per week watching it. Shows like "Leave Lucy," "Gunsmoke" and "Leave It to Beaver" were ratings leaders in the 50's and are still being shown today.

Fashions of the 50's included pillbox hats, circle skirts and capri length jeans for the ladies. For the male look of the 50's, one might consider wearing loud Hawaiian shirts, baggies or slinky suits with their suits. Mrs. June Huff, English Department Chairperson, explains about the fabulous fashions of the 50's, "I think the 'preppy' look like plaid shirts and crew-neck sweaters, look a lot like 50's fashions. However, I hope left shirts with poodles on them never return," she jokingly added.

The 50's were a carefree time. However, the threat of nuclear war was present and, although not known, one big fear was building bomb shelters.

No person is sure yet about the

return of those golden years of the music, fads and television shows saying guns—History is bound to repeat itself.



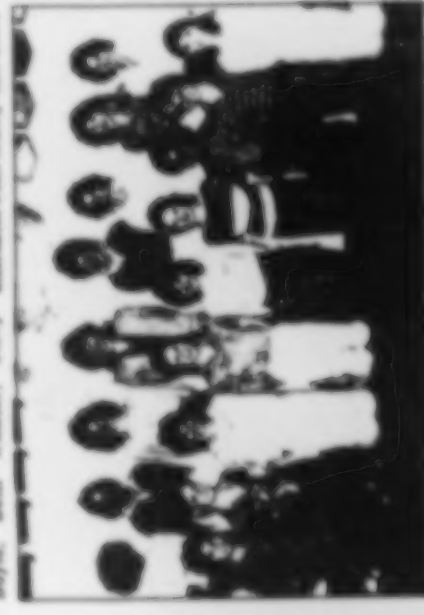
THE CAT'S MEOW—Brian Setzer, lead singer of the Stray Cats, shows the return of the 50's in his appearance and music style.

'84 cheerleading squads chosen

By Leslie Smart

Congratulations are in order. The 1984 cheerleading squads have been chosen. They are as follows: Varsity—Caryn Bonnell, co-captain; Amy Zesch, co-captain; Cassandra Case, Janet Ream, Julie Twillman, Nancy Neumaier, Tina Tourmina, Becky Bruggemann, Bonnie Boyle, Beth Whistler, Stacy

Steen, Susan Yeorgian, Cheryl Hayward, Beth Bruggeman, Ruby Allison, Lucy Celia and the alternates Beth Nave and Michele Byram. Sophomores—Amy Baumann, Kim Becker, Melanie Byram, Cyndi Kiefer, Laura Kreibbe, Karen Myers, Wendy O'Loughlin, Kim Robinson, Chris Shreve, Janine Smith and the alternates Joan Money and Emme-



1984 VARSITY CHEERLEADING SQUAD—Bottom row: Lucy Celia, Bonnie Boyle, Becky Bruggeman, Beth Whistler, Susan Yeorgian, Cheryl Hayward, Stacy Steen, Beth Bruggeman, Ruby Allison.

Top row: Janet Ream, Beth Nave, Julie Twillman, Tina Tourmina, Michelle Byram, Amy Zesch, Cassandra Case, Nancy Neumaier (Not pictured: Caryn Bonnell) photo by Jonsson

Youth may be growing up at a younger age

By Christine Bellows

Have you ever noticed the increasingly younger attendance at retail stores or glanced at a couple holding hands and were shocked to see that the lovebirds could be no older than 12?

Are America's kids growing up too fast?

As told in the magazine—America's Time Study, a professor of media studies at New York University, said—33 percent of the producers of television and advertising, the makers of clothing and cosmetics, the judges in juvenile courts and the writers of juvenile novels are all "comparing" 16 years—the distinction between children and adults.

A research project called the Children's Time Study, done from 1970 to 1980, revealed that watching television is a popular activity among high school students.

"By the time children finish high school, they have spent 11,000 hours in the classroom and roughly 60,000 hours outside. During that

time they have watched about 10,000 hours of television—the dominant out of school activity," as the America magazine explained.

Another factor in children's activities is the parent-child relationship.



STEADY DRIVERS—Sophomores Peggy O'Hall and Greg Lutz prepare to take the wheel in drivers' education class. photo by Daniels

Hypnotism aids people; subjects find it relaxing

By Dawn Walto

When someone mentions the word hypnosis, most people have visions of a night club magician swinging a gold chain tantalizingly before their eyes.

However, hypnosis is not what most people think it is. A lot of skepticism is centered around hypnosis and a lot of this is derived from television people who, after being hypnotized, are usually shown as having the hypnotist make them perform strange tasks. But this is not true. "A hypnotist can't make you do anything you don't want to do. He's just an instructor or a guide," stated Mr. Bill Paris, a hypnotist from the Certified Hypnotists Service. "You bring about this altered state of consciousness within yourself."

When someone goes to a hypnosis session, the hypnotist tries to get the person to totally relax to allow some changes to come about. "The person is supposed to concentrate on one thing and focus all of his attention on that one item so his mind won't wander. Then he will become comfortable and go into a hypnotic trance. Mr. Paris said, "What you are attempting to do is reeducate the client in terms of his abilities. In other words, a new philosophy on life."

Dr. Robert Schmitt, a psychologist at Barnes Hospital,

said, "It's a disquieting language that the person's unconscious understands, but the person doesn't. You're bringing about change without the person realizing it."

Admittedly, hypnosis is sometimes fails. Lack of motivation on the client's part, the client needs his symptoms and refuses to give them up, or a lack of skills on the therapist's part are a few of the reasons.

On the contrary, failure isn't the problem for Mr. Mark Dresner, basketball player for the Missouri Tigers. He underwent hypnosis before the Tigers played against Colorado in the first round game of the Big Eight Conference basketball tournament. Mr. Dresner scored 34 points in the 14 minutes he played in the Tigers' 73 victory. "I think we're going to give it another try," he said. "I don't know if it was the trick or not, but something worked."

"It's not damaging. I was aware of everything that was going on." Hypnosis can be used in many helpful ways. For instance, it is used for the elimination of bad habits, weight loss and solving crimes. Even dentists are using it. Roughly, 70-90 percent of the population has the capacity to be hypnotized.

teacher, explained, "Parents are more lenient today or kids just don't care."

As far as an overall reason, he believes it is due to a "change in social attitudes over the past 10 to 20 years. It's more relaxed today."

Lynn Nichols, junior, agrees that children are doing things at a younger age. "My older sister complains that I get to stay out later than she did and started to date at 15. My little sister gets to do things that I didn't get to do at her age. I think children should all be treated fairly while they're growing up."

With similar feelings, Darren Marbada, junior, explained, "He (little brother) gets to run around outside on weekends and doesn't get in trouble like I did. Kids are more involved in things today."

Whether or not the attitudes of children and their activities are dangerous to their upbringing, society is changing and children are changing with it.

After winning Conference meet; girls' track strides toward State

by Randall Thomas

The defending state champion girls' track team was the suburban North girls' conference meet for the third consecutive year. "The competitive girls' track team is better each year," commented girls' track coach Larry Milam. The Spartans were to host one of the six district Saturday May 1. "We should win the district meet. We're really hot running against the same girls in our conference," stated Kim Shepherd, junior sprinter.

The Spartans edged Hazelwood Central for the conference cross and longer championship by the slim margin of 10:15. Hazelwood Central really took off behind us," added Coach Milam.

The Spartans captured six first places led by triple winner Donna Elbertson, senior jumper. The

shot and Tamika Foster who won with the time of 4:07.

BOYS VARSITY TRACK

"Lack of participation really hurt us this season," commented boys' head track coach Butler Delarue. The Spartans are concluding a struggling season, as they tied for fifth place in the Suburban South conference meet Saturday April 15. "We hope to do better in districts," stated Robert Lawrence, senior sprinter.

"The team looks mentally prepared for districts," added Coach Delarue. Hazelwood East was to host one of the six districts Saturday, May 1. The Spartans won the Varsity Relays for the second consecutive year by edging undefeated McCluer 45-35.

"At least we can say we beat McCluer this conference meet," commented boys' head coach Delarue. At the conference meet, the Spartans ended tied for fifth place with Riverview Gardens with 31 points. "Fifth was the best we could do," added Coach Delarue.

McCluer went on to claim the conference cross and longer championship by edging the Riverview Gardens by the score of 150-50. The Spartans were tied for second place with Riverview Gardens and David Cameron who combined with Vince Hayes and David Webb to capture East's only first place with the 1000-meter relay.

Other runners up include Robert Lawrence in the 100 intermediate hurdles, David Cameron in the 400 meter run, and Ann Young in the 400 meter hurdles. Leading the way in the Varsity Invitational Relays with first place were Calvin Raymond in the 400 meter dash, Ann Young in the 400 meter run, and Hayes, Lawrence, Webb, and Cameron in the 1000 meter relay.

"The competition gets better and better each year."

According to state champion girls' track team events and captured the 400 meter relay who finished second to Riverview Gardens. Other runners up were Kathy Collier in the triple jump and Tamika Foster in the 400 meter run.

East also captured three firsts and one second out of four relays. The 100 meter relay with Chris Benton, Barbara Roeder, Jessica Barber and Pam Marshall won with the time of 18:05. Also victorious was the 400 meter relay with Kathy Collier, Janet Dunn, Beth Wilson, and Donna Elbertson with the time of 11:0.

The Spartans also won the mile relay (1000 meter relay) with Janet Dunn, Barbara Roeder, Pam Mar-



PANCY FOOTBALL—Cassandra Case, junior midfielder, turns the ball up field against a Riverview defender. East defeated Riverview, 2-0.

Baseball up and down; despite consistent hitting

by Bill Becker

The varsity baseball team was expected to play Tuesday afternoon against defending 4A State Champion Hazelwood Central. Even though the Spartans were up against the two-time state champs, they were very optimistic about the game and districts. "If we all work together and hit like we have been, we have a chance to take districts," commented Keith Sanders, junior pitcher.

During the regular season the Spartans lost three times to Central including an extra-inning defeat. "Central has a good team, we've gotten behind in the first few innings and can't catch back up," said third baseman Mike Kuelmann.

The Spartans defeated Rosary 5-4, behind the pitching of Joe Bald, and Keith Wambhoff, and then downed Pattonville 4-2, with Tony Jones on the mound.

Keith Sanders pitched his best game of the season against McCluer striking out nine while giving up only one hit in the 10-0 victory.

It took the Spartans 12 innings to

defeat Riverview 8-7. After 11 innings the score was tied at six.

The Rams scored one in their half of the twelfth. With one on and one out in the bottom half, Dave Stauss smacked his second homerun of the season giving the Spartans the win. Sanders, who took over for Wambhoff in the sixth, finished the contest for the win.

Stauss, who is only a junior, leads East with a 470 batting mark. He is followed by Gary Evans, senior, who is batting 420.

Sanders is also having a fine season, batting .410, while posting a 4-3 mark on the hill. Jones, who is also a junior has a record of 3-2. "Our hitting has been strong all year. A lot of guys have had a pretty good year with the bat," commented Head Coach Ken Green.

The Spartans have an overall record of 8-7 and are 6-5 in conference. "We've been a very streaky team this year. Sometimes we win four in a row and then we turn around and lose three straight. With a little more consistency, we could have had a better record," concluded Stauss.

Varsity kickers strive for consistency; conference swim meet to be at East

by Jim King and Mike Kuelmann
"Our main objective is to be consistent in our team play," said Mr. Dale Harmon, varsity soccer coach.

The Spartans' record stands at 1-4 and 3-0-1 in conference. "I think that we have the potential to play a lot better than our record shows. I know we will pull through," said Lisa Petty, senior forward. Jill Lamp, junior goalie, had a similar comment. "I don't think we are playing as well as we're capable of playing."

East suffered its first loss at the hands of Hazelwood Central, 3-1. The girls then defeated Pattonville 1-0, Riverview 3-0 and Parkway Central 8-1. East also tied Rosary twice, 1-1 and 0-0.

The big scoring threat of the Spartans is Lisa. She has already passed up last season's total goals with 17 other leading scorers for East are Judy Hoyacki, sophomore forward, and Robin Shelton, junior forward. Coach

GIRLS SWIMMING

With a 6-2 nonconference record and a 3-1 conference record the girls swim team seems to have another terrific season. Jennifer Chase, Jill Sanders, Linda Vogan and Lisa Goethe qualified for state in the free style relay with their fastest time of 4:09.65. Lisa Goethe

dominated by placing her best time this year in the 100 2:17.08 against McCluer. Linda Vogan swam runner up in the 100 free with a 1:00.25, also against McCluer.

East held a tri-meet here Wednesday, May 4, against Parkway West and Mary Institute. East placed third in the meet. "We were up against some good competition in this meet. Parkway West were the State Champions last year, but some people got their best times," said Laura Ebbe, freestylist.

The State meet will be May 20-21. The conference championships will be held here on May 13-14. "Right now, our team goal is to bring down each individual time. If successful, we have a good shot at finishing among the top three," said Coach Bill Batke.

Among the teams' losses, East lost to Pattonville, the only other team to have a perfect record. Also McCluer North has a strong but underrated team and could do some damage in the conference meet.

GOLF

"We're very young and we don't know how to golf under pressure too well," explained Rodney Sneed, sophomore. The Spartans tied for fifth in the Suburban North Conference meet at St. Andrews.

"We should do better now that many have had varsity experience."

East tied for fifth with McCluer North with a total of 433, just behind fourth place

Ritenour, 432. Hazelwood Central won the meet with a score of 403, followed by Pattonville 416 and Hazelwood West 425.

Rich Schroeder, senior, tied for tenth in the meet with an 83. He finished 11 strokes behind the leader.

Riverview, once again, upset East by one shot in head-to-head play 386-387. Schroeder shined for the Spartans, shooting a 40, at North Shore.

The Spartans also lost to Hazelwood Central, who is the powerhouse in Suburban North golf 240-271. Medalist for East was Bob Atkinson, who shot a 43 at Paddock.

"Our biggest problem is the inconsistency," said Rich Schroeder.

Tennis team looks at a shaky season; young golfers struggle under pressure

by Mike Kuelmann

and Bill Becker

After coming off a close loss to Riverview, the boys' Tennis team came back to beat both Ritenour 5-2 and St. Charles 6-1.

East added another win against Aquinas. The doubles team of Brian Shannon and Kevin Shaw beat Hazelwood West 6-2, 7-5, and then lost to Hazelwood Central 6-3, 6-0 in the recent conference meet.

Although East's season was not the best, it did serve a good purpose. "We should do a lot better next season now that many young players have had varsity experience," said sophomore Brian Shannon.

East is participating in the Country Day Tournament that will be tomorrow.

ALL ALONE—Tamika Foster, junior, strikes up the 400 meter run. photo by David



FINISHING STRIDES—Vince Hayes, senior half-miler, plays in a strong second place behind a Hazelwood Central opponent. photo by David

DEFENDANTS' EXHIBIT E

JOURNALISM II

I. COURSE DESCRIPTION

JOURNALISM II provides a laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I. (Prerequisite: Journalism I)

II. COURSE OBJECTIVES

A. Concepts: The main ideas will be

1. An experience for students to practice journalistic techniques learned in Journalism I by publishing the school newspaper under the pressure of pre-established deadlines.
2. the legal, moral, and ethical restrictions imposed upon journalists within the school community.
3. responsibility and acceptance of criticism for articles of opinion.
4. leadership responsibilities as issue and page editors.
5. creative and imaginative layouts which present the news within an accurate, fair, and balanced format.
6. pride in the school newspaper.
7. journalism as a potential career choice.

B. Skills (Skills learned in Journalism I will be reinforced in Journalism II).

1. Listening: The student will be able to reinforce those skills emphasized in Journalism I regarding listening to others, "reading between the lines" of statements, understanding directions and assignments, recognizing alternate ideas for stories while interviewing.

2. Speaking: The student will be able to.
 - a. develop further the art of questioning, cross-examining, and critically analyzing an individual news source.
 - b. converse effectively by telephone with a news source.
3. Viewing: The student will be able to
 - a. create photographic ideas for use in the school newspaper; examine contact prints and actual photos to choose the best available.
 - b. arrange the components of a page layout so that they are visually pleasing.
 - c. choose proper headline styles and sizes to please the eye and fit the personality of the story.
 - d. develop artistic ideas for the newspaper.
4. Reading: The student will be able to
 - a. read and analyze exchange newspapers for ideas, techniques, and coverage.
 - b. analyze and review each issue of the school newspaper.
5. Writing: The student will be able to
 - a. create, research, and write stories for use in the school newspaper.
 - b. write under pressure to meet a deadline.
 - c. compose headlines following journalistic rules.
 - d. write cutlines for pictures of actual events and captions for feature photographs.
 - e. learn, through reader feedback, the interests of the reading audience.
 - f. review a film, play, or other creative work with an appreciation of problems and artistic skills involved in the production.

- g. research a subject "in-depth" to write a documented analysis of a school problem or issue.
 - h. prepare copy which conforms to pre-established rules of style and format in manuscript.
 - i. understand and accept critical evaluation of the newspaper by readers and critical services.
- C. Values: The student may be able to value
 1. the skills required in researching and writing under the pressure of a deadline.
 2. restraints imposed upon the journalist or the need to question those restraints in a changing society.
 3. becoming a more effective critic of himself by listening to and accepting criticism.
 4. the problems, responsibilities, and skills required in leadership roles.
 5. compromise and cooperation with staff members in producing the school newspaper.
 6. responsibility for legal, moral, and ethical restrictions imposed on journalists by the community.
 7. the pressures and responsibilities of the professional journalist.
 8. being responsible for what one writes.

III. MATERIALS

- A. Text: SCHOLASTIC JOURNALISM (Fifth Edition), English and Hach.
- B. Teaching Aids (see materials listed at the end of individual units.)

C. Supplies

1. Headline chart
2. Layout dummies
3. Thumbnails (small layout sheets)
4. Color-coded copy, headline, and special body type sheets
5. Production tools (rules, glue, grease pencils, erasers, art pencils, art paper, paints, kraft paper, stapler, masking tape)
6. Sample newspapers
7. Photo croppers
8. List of students in school, in alphabetical order
9. List of staff and hour by hour location of staff members
10. List of administrators, titles, location and duties
11. List of publication deadlines

IV. UNITS

A. Required Units

1. Layout and Makeup Techniques of a School Newspaper
 - a. Objectives: The student will be able to
 - (1) list the purposes of page makeup.
 - (2) describe the two basic principles of make-up: balance and contrast.
 - (3) describe the major types of front-page make-up.
 - (4) apply the rules of make-up to "inside pages" and use special guidelines for these pages.

- (5) list the do's and don'ts of make-up.
- (6) work up a dummy of a news page using proper journalistic symbols.
- (7) crop and scale pictures.
- (8) use and properly mark copy sheets, headline sheets, pictures, and special body type sheets for the printing company.
- (9) read and correct proofs.
- (10) define the major terms used in page make-up and layout.

b. Materials

- (1) Text: SCHOLASTIC JOURNALISM, Chapters 16 and 17
- (2) Teaching Aids: MODERN NEWSPAPER DESIGN, Edmund D. Arnold, Harper & Row, New York, 1969.
- (3) Supplies
 - (a) Printing materials supplied by school
 - (b) Newspaper dummies (layout sheets)
 - (c) General supplies (rulers, rubber cement, scissors, etc.)

c. Suggested Activities

- (1) Cut out make-up elements — stories, headlines, art-work, and pictures — from old school or metropolitan newspapers, paste on dummy following one of the major types of page make-up.
- (2) Select an exchange newspaper and give an oral report on its makeup, pointing out strengths and weaknesses.
- (3) Take the most recent issue of the school newspaper and reproduce a dummy of any one of the pages. Mark it completely as though it were being sent to the printer. When finished,

compare your dummy with the original copy sent to the printer. Note that the printer may have had to make last-minute adjustments.

- (4) Layout a complete newspaper on thumbnail dummies. Create a style for each page to reflect its content.
- (5) Teacher activity: Using MODERN NEWSPAPER DESIGN' or similar book, ditto and distribute common newspaper terms for class to discuss and learn. Include the following: display headline, banner, nameplate, masthead, dummy, art, bleed, body-type, border, character, column, composition, dateline, down-style, filler, flush, head-shot or mug, justified column, offset, typo, up-style, widow, air, screen, tombstone, bump, kicker, hammer, ear, eyebrow, deck, point, pica, gray matter, floating nameplate, thumbnail, box, bold face, subhead, cut, serif, sans serif, hanging indentation, flush left heads, canopy, jump head, byline, photo credit, cutline, caption, ident line, label head, standing head, folio marker, caps and lower case, facing pages or truck, gutter, column breakers.

2. Producing the School Newspaper

a. Objectives: The student will be able to

- (1) write, edit, and layout a newspaper page within a given deadline period.
- (2) make critical evaluations as to what constitutes suitable material for the school newspaper and what does not.
- (3) present the news of the school in a comprehensive, researched, and responsible manner.
- (4) work within and fulfill responsibilities (including leadership roles) in a staff organization.

- (5) gather news from sources outside the classroom through use of reporting skills such as interviewing, reading, telephoning, researching, thinking, notetaking, etc.
- (6) defend choice of news and features or statements of opinion on the basis of positive educational criteria.

b. Materials

- (1) Text: SCHOLASTIC JOURNALISM
- (2) Teaching Aids
 - (a) Reference books (dictionaries, thesauruses)
 - (b) School and Board of Education publications.
- (3) Supplies
 - (a) Typewriters
 - (b) Layout materials (dummies, copy sheets, headline sheets, headline schedule, special body type sheets, typing paper)
 - (c) General supplies
 - (d) School calendar
 - (e) List of students in school
 - (f) List of and location of staff members during each school hour.
 - (g) School calendar

c. Suggested Activities: (Activities for the adviser)

- (1) Establish a budget for the school year with schedule of publication dates, average cost per issue.
- (2) Organize the newspaper staff with responsibilities clearly established for each person. A suggested plan follows:

Adviser
Editor(s)
Copy Editor(s)

News Editor	Editorial Editor	Feature Editor	Sports Editor
News Staff	Editorial Staff	Feature Staff	Sport Staff

- (3) Set up schedule of deadlines for the staff including the following:
 - (a) stories due deadline for each page
 - (b) page layout due deadline
 - (c) page deadline—all copy, artwork, headlines, and special body type ready for printer
 - (d) late copy deadline (for planned late stories)
 - (e) proof schedule
 - (f) publication date
- (4) Maintain permanent file folders for each page to which the adviser and members of the staff have access at all times. Include in the file the following: log, layout materials, copy of deadlines, stories, headlines, and pictures (as completed).
- (5) Begin work on an issue at least two weeks, preferably three or four weeks, prior to publication. (An inexperienced class needs at least three weeks to prepare an issue.)
- (6) Set up a regular schedule of activities to follow in publishing the newspaper. A suggested schedule follows (three-week publication plan.)

Monday

Organize staff. Choose editors and page editors. Work on log (list of stories and pictures).

Tuesday

Complete log (this may require legwork to check out ideas).

Wednesday

Fill out photo requests for any pictures needed. Legwork on stories, gathering facts, ideas, opinions, etc.

Thursday and Friday

Work on stories. Adviser and editors should check with page editors regularly to see how ideas are developing.

Monday

Editorial copy deadline. Begin work on editorial page dummy. Other pages continue work on stories.

Tuesday

Editorial layout due. Feature page stories due. Page begins work on layout.

Wednesday

Editorial page should be ready for printer. Feature page layout due. Page one stories due. Page one begins layout.

Thursday

Feature page should be ready for printer. Page one layout due. Sports stories due. Sports page begins layout.

Friday

Page one should be ready for printer. Sports page should finish layout and all stories and pictures possible should be prepared for the printer.

Monday

Sports page finishes final stories, headlines, and pictures. (If staff and adviser are available, it is preferable to do this on weekend and send to printer; otherwise, the stories may be sent too

late for proofing.) Rest of staff works on posters and announcements for upcoming issue.

Tuesday

Read proofs if available from printer. Work on posters and promotion of issue.

Wednesday

Finish proof and call in corrections to printer. Hang up remaining posters.

Thursday

Set up sales plan. Discuss what to promote in the issue with the staff.

Friday

Prepare newspapers for exchange mailing. Sell papers throughout school.

- (7) Maintain supplies and materials drawer for use by staff in preparing newspaper and in promoting its sales.
- (8) Organize photography staff and establish a clear procedure for requesting, taking, developing, and printing pictures with deadlines commensurate with those for the various pages of the newspaper.
- (9) Develop one or more staff artists. Work with art department of school to improve artwork and artistic design of newspaper.
- (10) Establish a liason with the school principal and discuss frequent newspaper ideas and content to know what he expects.
- (11) Carry on a dialogue with each editor continuously as to the newspaper's content. Help the staff turn bare ideas into well-researched, written, and edited stories.

B. Optional Units (Must be based upon adopted materials and approved in advance by department chairperson.)

1. Journalism as a Career
2. Basic Yearbook Layout (Teach at end of school year, if time allows, to give pre-yearbook students a head start).
3. Broadcast Journalism

DEFENDANTS' EXHIBIT H

348.5 Student publications

- a. Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors.
- b. Students who edit, publish or distribute handwritten, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications.
- c. Libel, obscenity, and personal attacks are prohibited in all publications.
- d. Unauthorized commercial solicitation will not be allowed on school property at any time. An exception to this rule will be the sale of non-school sponsored student newspapers published by students of the District at times and in places as designated by school authorities.

348.51 School sponsored publications

School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

- a. All materials must be signed.
- b. The material will be evaluated by an editorial review board of students from the publications classes.

- c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers, and two publication students will evaluate the recommendations of the student editorial board. Their decision will be final.

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the educational process.

Pressure describes it all Pregnancy affects many

by Andrea Callow
Sixteen year old Sue had it all—good looks, good grades, a loving family and a cute boyfriend. She also had a seven pound baby boy. Each year, according to Claire Berman (Readers Digest May 1983), close to 1.1 million teenagers—more than one out of every ten teenage girls—become pregnant. In Missouri alone, 8,208 teens under the age of 18, became pregnant in 1980, according to Reproductive Health Services of St. Louis. That number was 7,363 in 1981.

Unplanned pregnancies can no longer be dismissed as something that only happens to disadvantaged teens from lower social-economic groups. In fact, the highest rise in out-of-wedlock births has been among 15 to 17 year old whites, according to Claire Berman. Thirty percent of births out-of-wedlock in Missouri were to young white mothers and 89 percent were to young mothers of other races.

Teenage sexuality — Other statistics connected with teenage pregnancy are equally noteworthy. The rate of teenage sexual activity in the U.S. is alarmingly high. Of every teenagers in the country, between the ages of 13 and 19, seven million teenage boys and five million teenage girls are sexually active, according to a study done by the Alan Guttmacher Institute, which specializes in family planning. According to the national average, teenagers begin sexual activity at about age 16.

Birth control — Nearly, two-thirds of sexually active teenagers do not use birth control. If birth control is used, it is used irregularly. The 62 percent who have never used birth control run a high risk of getting pregnant. "I've had many a girl tell me she gave her pills to a friend because she wouldn't be needing them herself that week," says a nurse who works with pregnant teens (Readers Digest, May 1983). "When sex education is offered, it too often is confined to diagrams of the uterus and ovary. A lot of kids have seen a lot of diagrams. What they don't know is sex can lead to babies!"

Even with the availability of birth control, many teens experiment with sex for months before using contraceptives. "It's as if being prepared makes one immoral," says Linda Nessel, who is associated with the Pregnant Teen, Teen Mother program at New York's YMCA. "These girls believe that if you plan for sex, you're fast or bad. So it's the 'good' girls who get pregnant."

Mom and dad — Parents

should discuss sex with their children, talking about emotions as well as actions, making their children aware of the parental standing and the reason for them, according to Claire Berman.

However, 98 percent of our countries parents say they feel uncomfortable and need help in discussing sex with their own children, says Planned Parenthood Affiliates of Missouri.

Sex-education specialist, Ruth MacDonald, urges that parents learn to talk more

ever ten abortions were obtained by teenagers.

A major problem in teenage abortions is teenagers delay having their abortions, thereby increasing risks to health by as much as 100 percent for every week delayed, says Planned Parenthood.

Although most teenagers choose abortion, says Claire Berman, there are still three live births for every five abortions.

Consequences — CES: The consequences of teenage

TEEN ABORTIONS, 1976-1980

AGE	1976	1977	1978	1979	1980
Total	13,869	14,762	17,785	21,267	21,671
Under 15	237	256	250	293	263
15-17	1,945	2,239	2,694	3,071	2,976
18-19	2,498	2,547	2,986	3,800	3,767

Obtained from the Missouri Association of Planned Parenthood Affiliates, Inc.

comfortably about the subject, because their children are surrounded by it. "Parents can't stop kids from listening to music or watching television," she says, "but they have to realize they are still the most important force in their children's lives—and that they have to get equal time with the other influences. This is a whole new society."

Abortion — Between the 1976 and 1980 there was a 51 percent increase in teenage abortions, according to Planned Parenthood. In 1980, three out of

pregnancy are alarming. The risk of death to babies born of teenage mothers is nearly two times greater than the risk to babies born of women in their 20's, according to Planned Parenthood. Teenagers are more likely to have premature birth and 23 percent more likely to suffer complications related to premature births. Teenagers also have a 39 percent greater risk of having a baby of low birth weight, a major cause of infant deaths, illnesses, and defects.

Another consequence of

teenage childbearing is the interruption of schooling. Teenage mothers who give birth before the age of 18 are only half as likely to graduate from high school as teens who put off childbearing until their 20's. Teenage fathers who are under the age of 18 at the birth of their babies are two-fifth as likely to graduate from high school as those who aren't fathers yet.

Teenage pregnancy is becoming an epidemic. It has become a major health, social, and economic problem for this country. Millions of teens get

pregnant each year and millions will in years to come. Could one of them be you?

Squeal law

by Christine De Hass
The squeal rule was proposed by the Health and Human Services Department to help prevent teenage pregnancy and to strengthen the communication bond between parents and their daughters, making teenage sexuality a family matter.

The rule would require

for today's teenagers teens each year

notification to parents within ten days of the time their daughter, under 18, received birth control pills, a diaphragm or an IUD from a federally-funded clinic.

Nationwide, the rule would affect around 5,100 clinics and over 500,000 minors who receive prescriptions from these clinics each year.

Proponents of the rule have brought figures into focus saying that the use of contraceptives by teenagers is dangerous to their health, but the statistics were obtained from women over 30 who smoke.

Planned Parenthood, which could lose \$30 million in federal subsidies by promising confidentiality to prescribers, introduced facts which prove that not the use of contraceptives, but being pregnant itself, is the riskier for teens. The statistics say that, for every 100,000 teenagers who give birth to live babies, approximately 11 girls die, as told to Amity Shlaes of "The New Republic."

Ms. Shlaes also pointed out another factor. "In a family where the child has already chosen to have sex without telling her parents, how will a letter in the mail announcing the fact improve family relations?"

Proponents argue that a girl who uses contraceptives and goes to a clinic is showing responsible actions. By putting the rule into effect, it would put girls down for their actions.

Proponents say that the rule would decrease pregnancies if put into effect. However, experts say that if the rule was put into effect, teenage pregnancies would increase up to 100,000 a year. For all points, the rule is out of date in a world where male contraceptives are available at the local drug store.

To the satisfaction of the rule's opponents, a federal judge disallowed the government from putting the rule into effect by issuing a permanent injunction against it in early March.

Mrs. Barbara Bughman, nurse at East, would not agree or disagree with the judge's decision. "I can see both sides. There are cases where it would be beneficial. I can't say whether it's right or wrong. It's an individual thing."

Introduction

These stories are the personal accounts of three Hazelwood East students who became pregnant. All names have been changed to keep the identity of these girls a secret.

Terri:

I am five months pregnant and very excited about having my baby. My husband is excited too. We both can't wait until it's born.

After the baby is born, which is in July, we are planning to move out of his house, when we save enough money. I am not going to be coming back to school right away (September) because the baby will only be

two months old. I plan on coming back in January when the second semester begins.

When I first found out I was pregnant, I really was kind of shocked because I kept thinking about how I was going to tell my parents. I was also real happy. I just couldn't believe I was going to have a baby. When I told Paul about the situation, he was really happy. At first I didn't think he would be because I wasn't sure if he really would want to take on the responsibility of being a father, but he was very happy. We talked about the baby and what we were going to do and we both wanted to get married. We had talked about marriage before, so we were both sure of what we were doing.

I had no pressures (to have sex). It was my own decision. We were going out four or five months before we had sex. I was on no kind of birth control pills. I really didn't want to get them, not just so I could get pregnant. I don't think I'd feel right taking them.

At first my parents were upset, especially my father, but now they're both happy for me. I don't have any regrets because I'm happy about the baby and I hope everything works out.

Patti:

I didn't think it could happen to me, but I knew I had to start making plans for me and my little one. I think Steven (my boyfriend) was more scared than me. He was away at college and when he came home we cried together and then accepted it.

At first both families were disappointed, but the third or fourth month, when the baby started to kick and move around, my boyfriend and I felt like expecting parents and we were very excited!

My parents really like my boyfriend. At first we all felt sort of uncomfortable around each other. Now my boyfriends supports our baby totally (except for the money) and my parents really does love us, so we're happy. After I graduate next year, we're getting married.

I can talk to her about anything but she can't face her and tell her she's pregnant. I never thought it would happen to me.

My boyfriend and I have a beautiful baby and it's been that way since three years ago. I really do think the future looks good for both of us.

Steven told me of my baby. We have a good amount for him (baby) and he's away at school. I get to see him as I need it.

I want to see others that it isn't easy and it's a strong, willing person to handle it because it doesn't give up a lot of things. Secondly, if you're not going to give your child all the love and affection around, you can't be a good parent. Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

This experience has made me a more responsible person. I feel that now I am a woman. If I could go back to last year, I would not get pregnant, but I

have no regrets. We love our baby more than anything in the world (my boyfriend and I) because we created him! How could we not love him??? He's so cute and innocent.

Julie:

At first I was shocked. You always think "It won't happen to me". I was also scared because I did not know how everyone was going to handle it. But then, I started getting excited.

There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything.

I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it. Greg and I did not get married. We figured that those were the best circumstances. So we decided to wait and see how things go. We are still planning on getting married when we are financially ready. I also am planning on going to college at least part time.

My parents have been great. They could not have been more supportive and helpful. They are doing everything they can to help us and enjoy being "grandma and grandpa". They have also made it clear it was my responsibility.

My parents (especially my mom) are willing to talk about sex, but I always feel very uncomfortable. I guess you never think about your parents doing things like that. An older

Divorce's impact on kids may have lifelong effect

by Shari Gordon

In the United States one marriage ends for every two that begin. The North County percentage of divorce is three marriages end out of four marriages that start.

There are more than two central characters in the painful drama of divorce. Children of divorced parents, literally millions of them, are torn by the end of their parents' marriage.

"In the beginning I thought I caused the problem, but now I realize it wasn't me."

What causes divorce? According to Mr. Ken Kerckhoff, social studies teacher some of the causes are:

- Poor dating habits that lead to marriage.
- Not enough variables in common.
- Lack of communication.
- Lack of desire or effort to make the relationship work.

Figures aren't the whole story. The fact is that divorce has a psychological and sociological change on the child.

One junior commented on how the divorce occurred, "My dad didn't make any money, so my

mom really couldn't stand it any longer," said another junior.

Diana Herbert, freshman, said "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me," added Diana.

"I was only five when my parents got divorced," said Susan Kiefer, junior. "I didn't quite understand what the divorce between my parents really meant until about the age of seven. I understood that divorce meant my mother and father wouldn't be together again."

"It stinks!" exclaimed Jill Viola, junior. "They can, afterwards, remarry and start their lives over again, but their kids will always be caught in between."

Out of the 25 students interviewed 17 of them have parents that have remarried.

The feelings of divorce affects the kids for the rest of their lives, according to Mr. Kerckhoff. The effects of divorce on the kids lead to the following:

- Higher rate of absenteeism in school.
- Higher rate of trouble with school, officials and police.
- Higher rate of depression and insecurity.
- Run a higher risk of divorce themselves.

Teenage marriages face 75 percent divorce rate

by Beth Conley

is getting married young all it's cracked up to be? If it is, then why do three out of four marriages end up in the divorce court?

There are several reasons why teen marriages do not last. These include lack of behavioral maturity, early pregnancies, financial difficulties as well as the overemphasis on romantic love instead of realistic love for the basis of the relationship, according to Mr. Ken Kerckhoff, social studies teacher, who teaches Life in Families.

He went on to explain that romantic love reaches a high intensity of emotion that deteriorates quickly where realistic love is a more rational feeling, therefore longer-lasting.

"The main reason teens get married is because of pregnancy," said Mr. Kerckhoff. An article in *Seventeen* magazine (Feb. 1982) by Sheila Mary Eby, listed several other reasons, such as to escape a troubled home life or to show maturity.

Still, the divorce rate for teen marriages is 75 percent. For adults, one out of every two marriages end in divorce. Mr. Kerckhoff said, "If you marry your high school sweetheart right after you graduate, you have a 25 percent chance of success. If you wait four years, until you're 21, the odds increase 100 percent to 50 percent."

There are both pros as well as cons to getting married young.

Association in New York and a clinical instructor of psychiatry at New York Medical College, talked about the advantages of early marriage in an article in *Harper's Bazaar*. He said that there is the opportunity to influence each other's development and share in major decisions.

However, Mr. Kerckhoff disagrees. "There are some pluses, but in terms of statistics, they are very fleeting," he said.

The disadvantages outnumber the advantages considerably. Increased housing costs have made it next to impossible for most couples to live on their own, forcing them to live with their families. Jeanette Ciluffo Brandt, senior, who got married in November, lives with her husband in her parents' home. "The basement is completely furnished like an apartment. It's just till I get out of school," she said.

Mr. Kerckhoff added, "It (marriage) heaps you with responsibilities that are better handled later on. They (the couples) tend to run away from it (the responsibilities)."

Mr. Berstein concluded, "People who marry young may spend the rest of their lives wondering if they chose the right partner."

There are, however, exceptions to the rule. Dana Poque has been married for two years. She said the success of a marriage "depends on how mature you are. I matured a lot after I got married."

Teen marriages can beat the

Runaways and juvenile delinquents

Runaways

by Mary Williams

"My dad wouldn't buy me a pair of Jordache jeans. He says they are too expensive. I think I will run away!"

Not a very good excuse for leaving, right? Unfortunately for some, this is exactly the perfect excuse for escaping to a life out on their own. It is estimated, by the FBI, that one million teenagers a year run away looking for something better.

Most runaways leave for more serious reasons than a pair of jeans. For example from a *Globe-Democrat* Jan 1978 issue, Becky (a fictitious name) was referred to the Welfare Department by her high school counselor and placed in a foster home at age 14 because of sexual advances made to her by her father.

Patty (a fictitious name) ran away after an argument with her mother in which she (the mother) shouted in anger, "I don't care about you anymore." Patty recalled, "At that time, I took it seriously."

According to Mr. Thomas Bick, guidance counselor, "More girls run away than boys, usually because of a restriction or breakdown with someone." Other reasons for running away include: parental neglect, physical and sexual assault, discipline problems, pregnancy, marriage, restrictions and failure in school. The average runaway is 16 years old.

According to Detective Michael Williams of the St. Louis County Police Department's Juvenile Bureau, "About 95 percent of runaways in the Hazelwood area leave because of an argument with a parent. The other 5 percent result from physical abuse, emotional abuse, restrictions, or divorced parents living arrangements."

According to runaway service organizations about 35 percent of runaways nationwide leave home because of incest, 53 percent because of physical neglect and the rest are throwaways (children kicked out or simply abandoned by parents who move away).

Although this is seemingly not a common occurrence in Hazelwood, the actual truth is that in cities as large as St. Louis, Chicago and Los Angeles, runaways are a very common and rapidly growing problem. "Everyone thinks the grass is greener on

marks for gangs, drug pushers, pimps and other hardened criminals. Some are beaten, raped or homosexually assaulted or become victims of suicide.

Without adequate shelter and food, runaways are exposed to a whole range of medical illnesses, from respiratory infections to V.D. The use of dangerous drugs, petty thefts and especially shoplifting are common to runaways.

Experts offer advice to any person who is thinking of running away—don't! Seek help to patch up the cause of this temptation.

Help available for runaways

There are many places a prospective runaway can go to receive help: runaway hotline; friends or relatives; and the Police department, Division of Juvenile Services or the guidance counselor at school.

School counselors are sometimes thought of as mediators in problem situations, a job which involves a large amount of trust.

Mr. Bick said, "The first priority in a runaway case is to contact the student and make sure he is safe." Although this is very hard to do, it is usually achieved through the student's friends, relatives, teachers, faculty or parents.

After the student has been contacted, a meeting is set up between the parents and the student at school to discuss the problem.

According to Mr. Fred Davis, guidance counselor, "Through communication with the family members, we try to discover the hidden real cause of the problem and correct it. In cases of alcoholism and child abuse, I try to get them to face the problem and admit their guilt."

In addition to these counseling steps, Mr. Bick said, "I give the student a pamphlet to take home which is associated with the problem (child abuse), to place on a bed or someplace where the parent can see it. It is sort of an eye opener to the parent."

The steps of counseling change depending on the case because each situation is different. These steps are usually continued in cooperation with the family until it is successful, although Mr. Bick said, "It usually takes much more than one session."

Help is also available through court authorities called Deputy Juvenile Officers (DJO). DJOs are

are common occurrences in large cities

They are also notified by parents who come in and report their child as a runaway. Mr. Tom Caruso, DJO, said, "Most runaways stay close to home with a friend or relative, but every once in a while they go out of state."

The St. Louis County Police Department comes in contact with runaways from officers on the street (beat officers), parents and teachers.

Detective Williams said, "When a runaway goes out of state, they are automatically put in a computer teletype system which is relayed state to state. When a runaway is found, they are returned to their home state."

Both DJOs and the police department use counseling sessions to work out the family problems which cause the student to runaway. If nothing can be worked out or the case involves child abuse, protective action will be taken and a foster home may be provided. They also may be placed in group homes such as Marygrove, 2705 Mullanphy Lane, a home for girls, and Lakeside Center for boys, 13044 Marine Avenue.

Juvenile Delinquents

by Mary Williams

Juvenile delinquency is another problem associated with teenagers. A juvenile delinquent, as defined by Mr. Roy Wolverton, guidance counselor, is a child who does not conform to accepted rules or standards imposed by society. According to Mr. Wolverton, "They are usually not bad kids. Basically, we try to straighten up their acts."

Some of the main causes of delinquency are: neglect, peer pressure, and a poor self image. According to the Federal Bureau of Investigation in 1980, youths under the age of 18 account for about one third of all crime nationally. About 20 percent of all those arrested for violent crimes were juveniles. Juveniles accounted for 9.3 percent of the arrests for murder, 15.9 percent of the arrests for rape, 31.5 percent of the arrests for robbery, 15.5 percent of the arrests for aggravated assault and 49 percent of all those arrested for arson in 1979.

Mr. Davis stated that he has handled cases of runaways, truancy, arson, narcotics, theft, assault, extortion, incest, prostitution, runaways, receiving stolen goods, mental depression and behavioral

Mrs. Patricia Vawter, guidance counselor, said, "We help the student by listening—allowing the young person to talk freely without judgment on the part of the listener. We help explore possible actions and their consequences, and make referrals to outside agencies able to help on a more professional or continuing basis."

Help is sometimes offered through a Deputy Juvenile Officer (DJO), who checks up on the student regularly, anywhere from six months to up until they are 17 years old. According to Mr. Tom Caruso, DJO, "We exert our energies where ever necessary according to the problem."

Mr. Caruso stated that juveniles can be brought to juvenile court three ways: by the police department, by the student himself or by the parents, with the charge of incorrigibility (not obeying). "They are then processed for foster care and may never see their parents again."

The Police Department handles juvenile delinquents in different ways according to the seriousness of the crime. These crimes can range from status offenses such as curfew, incorrigibility, truancy, and runaways to murder. A status offense is an offense which is not considered a crime when committed by an adult.

Detective Williams of the St. Louis County Police Department said, "Juveniles have certain rights. For instance, they cannot be questioned without a parent or guardian present. They are then read their Miranda rights (you have the right to remain silent . . .) by a DJO and depending on the crime, the number of times committed and previous offenses, they can be tried as an adult if they are (at least) 14 years old. If they are deemed an adult, a juvenile officer is not appointed and they are tried as an adult."

Detective Williams continued, "Either way a court hearing is set up and if the student is found guilty, the court provides the appropriate punishment (such as probation). At age 17 a juvenile's record is wiped clean, but the court can have jurisdiction until the age of 21, when juveniles don't fulfill probation."

The courts try to help through social workers, the Division of Family Services, psychiatrists and group homes such as Marygrove, a home for girls, and Lakeside Center for Boys of St. Louis. Other services

Pressure describes it all Pregnancy affects many

by Andrea Callow

Sixteen year old Sue had it all—good looks, good grades, a loving family and a cute boyfriend. She also had a seven pound baby boy. Each year, according to Claire Berman (Readers Digest May 1983), close to 1.1 million teenagers—more than one out of every ten teenage girls—become pregnant. In Missouri alone, 8,208 teens under the age of 18, became pregnant in 1980, according to Reproductive Health Services of St. Louis. That number was 7,363 in 1981.

Unplanned pregnancies can no longer be dismissed as something that only happens to disadvantaged teens from lower social-economic groups. In fact, the highest rise in out-of-wedlock births has been among 15 to 17 year old whites, according to Claire Berman. Thirty percent of births out-of-wedlock in Missouri were to young white mothers and 89 percent were to young mothers of other races.

Teenage sexuality

Other statistics connected with teenage pregnancy are equally noteworthy. The rate of teenage sexual activity in the U.S. is alarmingly high. Of every teenager in the country, between the ages of 13 and 19, seven million teenage boys and five million teenage girls are sexually active, according to a study done by the Alan Guttmacher Institute, which specializes in family planning. According to the national average, teenagers begin sexual activity at about age 16.

Birth control

Nearly two-thirds of sexually active teenagers do not use birth control. If birth control is used, it is used irregularly. The 62 percent who have never used birth control run a high risk of getting pregnant. "I've had many a girl tell me she gave her pills to a friend because she wouldn't be needing them herself that week," says a nurse who works with pregnant teens (Readers Digest, May 1983). "When sex education is offered, it too often is confined to diagrams of the uterus and ovary. A lot of kids have seen a lot of diagrams. What they don't know is sex can lead to babies!"

Even with the availability of birth control, many teens experiment with sex for months before using contraceptives. "It's as if being prepared makes one immoral," says Linda Nessel, who is associated with the Pregnant Teen, Teen Mother program at New York's YMCA. "These girls believe that if you plan for sex, you're fast or bad. So it's the 'good' girls who get pregnant."

Although peer pressure plays a large role in unintended pregnancies, ignorance seems to play the largest part. "In spite of their sexual experience, these youngsters lack in information," says Naomi Berman, who is also associated with the YMCA program. "They don't know such basic facts about their bodies as when conception is likely to occur and they're afraid to ask questions for fear of appearing dumb."

Mom and dad

Parents

should discuss sex with their children, talking about emotions as well as actions, making their children aware of the parental standing and the reason for them, according to Claire Berman.

However, 98 percent of our countries parents say they feel uncomfortable and need help in discussing sex with their own children, says Planned Parenthood Affiliates of Missouri.

Sex-education specialist, Ruth MacDonald, urges that parents learn to talk more

ever ten abortions were obtained by teenagers.

A major problem in teenage abortions is teenagers delay having their abortions, thereby increasing risks to health by as much as 100 percent for every week delayed, says Planned Parenthood.

Although most teenagers choose abortion, says Claire Berman, there are still three live births for every five abortions.

Consequences CES: The consequences of teenage

TEEN ABORTIONS, 1976-1980

AGE	1976	1977	1978	1979	1980
Total	13,869	14,762	17,785	21,267	21,671
Under 15	237	256	250	293	263
15-17	1,945	2,239	2,694	3,071	2,976
18-19	2,498	2,547	2,986	3,860	3,767

Obtained from the Missouri Association of Planned Parenthood Affiliates, Inc.

comfortably about the subject, because their children are surrounded by it. "Parents can't stop kids from listening to music or watching television," she says, "but they have to realize they are still the most important force in their children's lives—and that they have to get equal time with the other influences. This is a whole new society."

Abortion Between the years 1976 and 1980, there was a 51 percent increase in teenage abortions, according to Planned Parenthood. In 1980, three out of

pregnancy are alarming. The risk of death to babies born of teenage mothers is nearly two times greater than the risk to babies born of women in their 20's, according to Planned Parenthood. Teenagers are more likely to have premature birth and 23 percent more likely to suffer complications related to premature births. Teenagers also have a 39 percent greater risk of having a baby of low birth weight, a major cause of infant deaths, illnesses, and defects.

Another consequence of

pregnant each year and millions will in years to come. Could one of them be you?

Squeal law

by Christine De Hass

The squeal rule was proposed by the Health and Human Services Department to help prevent teenage pregnancy and to strengthen the communication bond between parents and their daughters, making teenage sexuality a family matter.

The rule would require

marks for gangs, drug pushers, pimps and other hardened criminals. Some are beaten, raped or homosexually assaulted or become victims of suicide.

Without adequate shelter and food, runaways are exposed to a whole range of medical illnesses, from respiratory infections to V.D. The use of dangerous drugs, petty thefts and especially shoplifting are common to runaways.

Experts offer advice to any person who is thinking of running away—don't! Seek help to patch up the cause of this temptation.

Help available for runaways

There are many places a prospective runaway can go to receive help: runaway hotline; friends or relatives; and the Police department, Division of Juvenile Services or the guidance counselor at school.

School counselors are sometimes thought of as mediators in problem situations, a job which involves a large amount of trust.

Mr. Bick said, "The first priority in a runaway case is to contact the student and make sure he is safe." Although this is very hard to do, it is usually achieved through the student's friends, relatives, teachers, faculty or parents.

After the student has been contacted, a meeting is set up between the parents and the student at school to discuss the problem.

According to Mr. Fred Davis, guidance counselor, "Through communication with the family members, we try to discover the hidden real cause of the problem and correct it. In cases of alcoholism and child abuse, I try to get them to face the problem and admit their guilt."

In addition to these counseling steps, Mr. Bick said, "I give the student a pamphlet to take home which is associated with the problem (child abuse), to place on a bed or somewhere where the parent can see it. It is sort of an eye opener to the parent."

The steps of counseling change depending on the case because each situation is different. These steps are usually continued in cooperation with the family until it is successful, although Mr. Bick said, "It usually takes much more than one session."

Help is also available through court authorities called Deputy Juvenile Officers (DJO). DJO's are usually notified of chronic runaway teenagers who have run away four times within one calendar year.

for today's teenagers teens each year

notification to parents within ten days of the time their daughter, under 18, received birth control pills, a diaphragm or an IUD from a federally-funded clinic.

Nationwide, the rule would affect around 5,100 clinics and over 500,000 minors who receive prescriptions from these clinics each year.

Proponents of the rule have brought figures into focus saying that the use of contraceptives by teenagers is dangerous to their health, but the statistics were obtained from women over 30 who smoke.

Planned Parenthood, which could lose \$30 million in federal subsidies by promising confidentiality to prescribers, introduced facts which prove that not the use of contraceptives, but being pregnant itself, is the riskier for teens. The statistics say that, for every 100,000 teenagers who give birth to live babies, approximately 11 girls die, as told to Amity Shlaes of "The New Republic."

Ms. Shlaes also pointed out another factor. "In a family where the child has already chosen to have sex without telling her parents, how will a letter in the mail announcing the fact improve family relations?"

Proponents argue that a girl who uses contraceptives and goes to a clinic is showing responsible actions. By putting the rule into effect, it would put girls down for their actions.

Proponents say that the rule would decrease pregnancies if put into effect. However, experts say that if the rule was put into effect, teenage pregnancies would increase up to 100,000 a year. For all points, the rule is out of date in a world where male contraceptives are available at the local drug store.

To the satisfaction of the rule's opponents, a federal judge disallowed the government from putting the rule into effect by issuing a permanent injunction against it in early March.

Mrs. Barbara Bughman, nurse at East, would not agree or disagree with the judge's decision. "I can see both sides. There are cases where it would be beneficial. I can't say whether it's right or wrong. It's an individual thing."

Introduction

These stories are the personal accounts of three Hazelwood East students who became pregnant. All names have been changed to keep the identity of these girls a secret.

Terri:

I am five months pregnant and very excited about having my baby. My husband is excited too. We both can't wait until it's born.

After the baby is born, which is in July, we are planning to move out of his house, when we save enough money. I am not going to be coming back to school right away (September) because the baby will only be

two months old. I plan on coming back in January when the second semester begins.

When I first found out I was pregnant, I really was kind of shocked because I kept thinking about how I was going to tell my parents. I was also real happy. I just couldn't believe I was going to have a baby. When I told Paul about the situation, he was really happy. At first I didn't think he would be because I wasn't sure if he really would want to take on the responsibility of being a father, but he was very happy. We talked about the baby and what we were going to do and we both wanted to get married. We had talked about marriage before, so we were both sure of what we were doing.

I had no pressures (to have sex). It was my own decision. We were going out four or five months before we had sex. I was on no kind of birth control pills. I really didn't want to get them, not just so I could get pregnant. I don't think I'd feel right taking them.

At first my parents were upset, especially my father, but now they're both happy for me. I don't have any regrets because I'm happy about the baby and I hope everything works out.

Patti:

I didn't think it could happen to me, but I knew I had to start making plans for me and my little one. I think Steven (my boyfriend) was more scared than me. He was away at college and when he came home we cried together and then accepted it.

At first both families were disappointed, but the third or fourth month, when the baby started to kick and move around, my boyfriend and I felt like expecting parents and we were very excited!

My parents really like my boyfriend. At first we all felt sort of uncomfortable around each other. Now my boyfriends supports our baby totally (except for money) and my parents are really doing love us, so I'm happy. After I graduated next year, we're getting married.

I can talk to her about anything but not face her and tell her I'm pregnant. I never thought it would happen to me.

My boyfriend and I have a beautiful baby and it's been that way since three years ago. I really do think the future looks good for both of us.

Steven told me of my baby. We have a lot to count on him (baby) and he's away at school I get to see him as I need it.

I want to see where this isn't easy and it's a strong, willing person to handle it because it doesn't give up a lot of things. Secondly, if you're not going to give your child all the love and affection around, you can't be a good parent. Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

This experience has made me a more responsible person. I feel that now I am a woman. If I could go back to last year, I would not get pregnant, but I

have no regrets. We love our baby more than anything in the world (my boyfriend and I) because we created him! How could we not love him???

Julie:

At first I was shocked. You always think "It won't happen to me." I was also scared because I did not know how everyone was going to handle it. But the, I started getting excited.

There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything.

I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it. Greg and I did not get married. We figured that those were the best circumstances. We decided to wait and see how things go. We are still planning on getting married when we are financially ready. I also am planning on going to college at least part time.

My parents were very great. They could not have been more supportive and helpful. They are doing everything they can for us and enjoy being "granda and grandpa." They have also made it clear it was my responsibility.

My parents (especially my mom) are willing to talk about sex, but I always feel very uncomfortable. I guess you never think about your parents doing things like that. An older

are common occurrences in large cities Divorce's impact on kids may have lifelong effect

They are also notified by parents who come in and report their child as a runaway. Mr. Tom Caruso, DJO, said, "Most runaways stay close to home with a friend or relative, but every once in a while they go out of state."

The St. Louis County Police Department comes in contact with runaways from officers on the street (beat officers), parents and teachers.

Detective Williams said, "When a runaway goes out of state, they are automatically put in a computer teletype system which is relayed state to state. When a runaway is found, they are returned to their home state."

Both DJO's and the police department use counseling sessions to work out the family problems which cause the student to runaway. If nothing can be worked out or the case involves child abuse, protective action will be taken and a foster home may be provided. They also may be placed in group homes such as Marygrove, 2705 Mullany Lane, a home for girls, and Lakeside Center for boys, 13044 Marine Avenue.

Juvenile Delinquents

by Mary Williams

Juvenile delinquency is another problem associated with teenagers. A juvenile delinquent, as defined by Mr. Roy Wolverton, guidance counselor, is a child who does not conform to accepted rules or standards imposed by society. According to Mr. Wolverton, "They are usually not bad kids. Basically, we try to straighten up their acts."

Some of the main causes of delinquency are: neglect, peer pressure, and a poor self image. According to the Federal Bureau of Investigation in 1980, youths under the age of 18 account for about one third of all crime nationally. Also 20 percent of all those arrested for violent crimes were juveniles. Juveniles accounted for 9.3 percent of the arrests for murder, 15.9 percent of the arrests for rape, 31.5 percent of the arrests for robbery, 15.5 percent of the arrests for aggravated assault and 49 percent of all those arrested for arson in 1979.

Mr. Davis stated that he has handled cases of runaways, truancy, arson, narcotics, theft, assault, extortion, incest, prostitution, runaways, receiving stolen goods, mental depression and behavioral disorders. According to Mr. Davis, the possible symptoms of a problem are depression, divorce, disease, death and family breakups.

Mrs. Patricia Vawter, guidance counselor, said, "We help the student by listening—allowing the young person to talk freely without judgment on the part of the listener. We help explore possible actions and their consequences, and make referrals to outside agencies able to help on a more professional or continuing basis."

Help is sometimes offered through a Deputy Juvenile Officer (DJO), who checks up on the student regularly, anywhere from six months to up until they are 17 years old. According to Mr. Tom Caruso, DJO, "We exert our energies where ever necessary according to the problem."

Mr. Caruso stated that juveniles can be brought to juvenile court three ways: by the police department, by the student himself or by the parents, with the charge of incorrigibility (not obeying). "They are then processed for foster care and may never see their parents again."

The Police Department handles juvenile delinquents in different ways according to the seriousness of the crime. These crimes can range from status offenses such as curfew, incorrigibility, truancy, and runaways to murder. A status offense is an offense which is not considered a crime when committed by an adult.

Detective Williams of the St. Louis County Police Department said, "Juveniles have certain rights. For instance, they cannot be questioned without a parent or guardian present. They are then read their Miranda rights (you have the right to remain silent . . .) by a DJO and depending on the crime, the number of times committed and previous offenses, they can be tried as an adult if they are (at least) 14 years old. If they are deemed an adult, a juvenile officer is not appointed and they are tried as an adult."

Detective Williams continued, "Either way a court hearing is set up and if the student is found guilty, the court provides the appropriate punishment (such as probation). At age 17 a juvenile's record is wiped clean, but the court can have jurisdiction until the age of 21, when juveniles don't fulfill probation."

The courts try to help through social workers, the Division of Family Services, psychiatrists and group homes such as Marygrove, a home for girls, and Lakeside Center for Boys of St. Louis. Other services to help the problems of young people include Youth in Need, 946-3771, the Youth Emergency Service (YES) 727-6294, and the Runaway Hotline, 1-800-621-4000.

by Shari Gordon

In the United States one marriage ends for every two that begin. The North County percentage of divorce is three marriages end out of four marriages that start.

There are more than two central characters in the painful drama of divorce. Children of divorced parents, literally million as them, are torn by the end of their parents' marriage.

"In the beginning I thought I caused the problem, but now I realize it wasn't me."

What causes divorce? According to Mr. Ken Kerckhoff, social studies teacher some of the causes are:

- Poor dating habits that lead to marriage.
- Not enough variables in common.
- Lack of communication.
- Lack of desire or effort to make the relationship work.

Figures aren't the whole story. The fact is that divorce has a psychological and sociological change on the child.

One junior commented on how the divorce occurred, "My dad didn't make any money, so my mother divorced him."

"My father was an alcoholic and he always came home drunk and

my mom really couldn't stand it any longer," said another junior.

Diana Herbert, freshman, said "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me," added Diana.

"I was only five when my parents got divorced," said Susan Kiefer, junior. "I didn't quite understand what the divorce between my parents really meant until about the age of seven. I understood that divorce meant my mother and father wouldn't be together again."

"It stinks!" exclaimed Jill Viola, junior. "They can, afterwards, remarry and start their lives over again, but their kids will always be caught in between."

Out of the 25 students interviewed 17 of them have parents that have remarried.

The feelings of divorce affects the kids for the rest of their lives, according to Mr. Kerckhoff. The effects of divorce on the kids lead to the following:

- Higher rate of absenteeism in school.
- Higher rate of trouble with school, officials and police.
- Higher rate of depression and insecurity.
- Run a higher risk of divorce themselves.

All of these are the latest findings in research on single parent homes.

Teenage marriages face 75 percent divorce rate

by Beth Conley

Is getting married young all it's cracked up to be? If it is, then why do three out of four marriages end up in the divorce court?

There are several reasons why teen marriages do not last. These include lack of behavioral maturity, early pregnancies, financial difficulties as well as the overemphasis on romantic love instead of realistic love for the basis of the relationship, according to Mr. Ken Kerckhoff, social studies teacher, who teaches Life in Families.

He went on to explain that romantic love reaches a high intensity of emotion that deteriorates quickly where realistic love is a more rational feeling, therefore longer-lasting.

"The main reason teens get married is because of pregnancy," said Mr. Kerckhoff. An article in *Seventeen* magazine (Feb. 1982) by Sheila Mary Eby, listed several other reasons, such as to escape a troubled home life or to show maturity.

Still, the divorce rate for teen marriages is 75 percent. For adults, one out of every two marriages end in divorce. Mr. Kerckhoff said, "If you marry your high school sweetheart right after you graduate, you have a 25 percent chance of success. If you wait four years, until you're 21, the odds increase 100 percent to 50 percent."

There are both pros as well as cons to getting married young. Alan Bernstein, co-director of Psychological Consultation

Association in New York and a clinical instructor of psychiatry at New York Medical College, talked about the advantages of early marriage in an article in *Harper's Bazaar*. He said that there is the opportunity to influence each other's development and share in major decisions.

However, Mr. Kerckhoff disagrees. "There are some pluses, but in terms of statistics, they are very fleeting," he said.

The disadvantages outnumber the advantages considerably. Increased housing costs have made it next to impossible for most couples to live on their own, forcing them to live with their families. Jeanette Ciluffo Brandt, senior, who got married in November, lives with her husband in her parents' home. "The basement is completely furnished like an apartment. It's just till I get out of school," she said.

Mr. Kerckhoff added, "It (marriage) heaps you with responsibilities that are better handled later on. They (the couples) tend to run away from it (the responsibilities)."

Mr. Bernstein concluded, "People who marry young may spend the rest of their lives wondering if they chose the right partner."

There are, however, exceptions to the rule. Dana Poque has been married for two years. She said the success of a marriage "depends on how mature you are. I matured a lot after I got married."

Teen marriages can beat the odds. Compromise is the key according to Ms. Eby.

Runaways and juvenile delinquents

Runaways

by Mary Williams

"My dad wouldn't buy me a pair of Jordache jeans. He says they are too expensive. I think I will run away!"

Not a very good excuse for leaving, right? Unfortunately for some, this is exactly the perfect excuse for escaping to a life out on their own. It is estimated, by the FBI, that one million teenagers a year run away looking for something better.

Most runaways leave for more serious reasons than a pair of jeans. For example from a Globe Democrat Jan 1978 issue, Becky (a fictitious name) was referred to the Welfare Department by her high school counselor and placed in a foster home at age 14 because of sexual advances made to her by her father.

Patty (a fictitious name) ran away after an argument with her mother in which she (the mother) shouted in anger, "I don't care about you anymore." Patty replied, "At that time, I took it seriously."

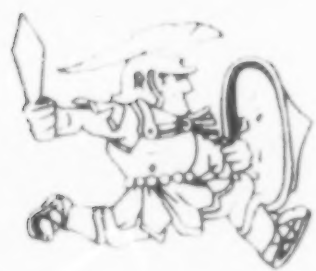
According to Mr. Thomas Bick, guidance counselor, "More girls run away than boys, usually because of a restriction or breakdown with someone." Other reasons for running away include: parental neglect, physical and sexual assault, discipline problems, pregnancy, marriage, restrictions and failure in school. The average runaway is 16 years old.

According to Detective Michael Williams of the St. Louis County Police Department's Juvenile Bureau, "About 95 percent of runaways in the Hazelwood area leave because of an argument with a parent. The other 5 percent result from physical abuse, emotional abuse, restrictions, or divorced parents living arrangements."

According to runaway service organizations about 35 percent of runaways nationwide leave home because of incest, 53 percent because of physical neglect and the rest are throwaways (children kicked out or simply abandoned by parents who move away).

Although this is seemingly not a common occurrence in Hazelwood, the actual truth is that in cities as large as St. Louis, Chicago and Los Angeles, runaways are a very common and rapidly growing problem. "Everyone thinks the grass is greener on the other side of the fence. It isn't," said Mr. Bick.

Once out on the streets, runaways are easy



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Anzalone and Beavers voted Prom royalty



SPARKLING STAR—1983 Prom Queen Jeanne Beavers, junior, smiles for pictures prior to the queen's dance.

photo by Brisk

by Mary Williams

"I was stunned when I heard my name called. Although I was nervous and I forgot what to do, it felt great to be queen," said Jeanne Beavers, junior, the new Prom queen.

Prom king Gary Anzalone, junior, said, "I was happy to be king, but I felt kind of embarrassed. I was glad to see that Jeanne was queen."

Despite the rain, Prom 1983 was "fantastic" according to Keith Sanders, junior class president.

Dave Stauss, junior, said, "I

thought the junior class and the sponsors put on a great show. Everything went smoothly and even the food was great."

All comments on prom were not favorable however. For example, Julie Adams, senior, said, "I think the band (Stash) was awful—too mellow."

Due to comments and criticism received by the junior class sponsors, Ms. Sue Ann DePriest, junior class sponsor, said that next year there will be a few changes. First of all, there will be a different band. Second, there will be more

time allowed for the court members to be with their dates. Third, slow music will be played during the coronation. And finally, for those people who criticized the favors being handed out one per couple, she sent a reminder that this was the first year that souvenirs were ever given out.

Possibly the most important part of prom is your date. Jenni Mitchell, senior, felt, "If you go with someone special, it makes the night more special."

Rich Nixon said, "It was the best prom I've ever been to."



PROM KING—Gary Anzalone, Junior, after being named 1983 Prom King, assumes his honored position in the court.

photo by Brisk



NEW ROYALTY—Juniors Jeanne Beavers and Gary Anzalone look to the crowd after being named 1983 Prom Queen and King along with retiring royalty seniors Peggy Koch and Matt Gentry.

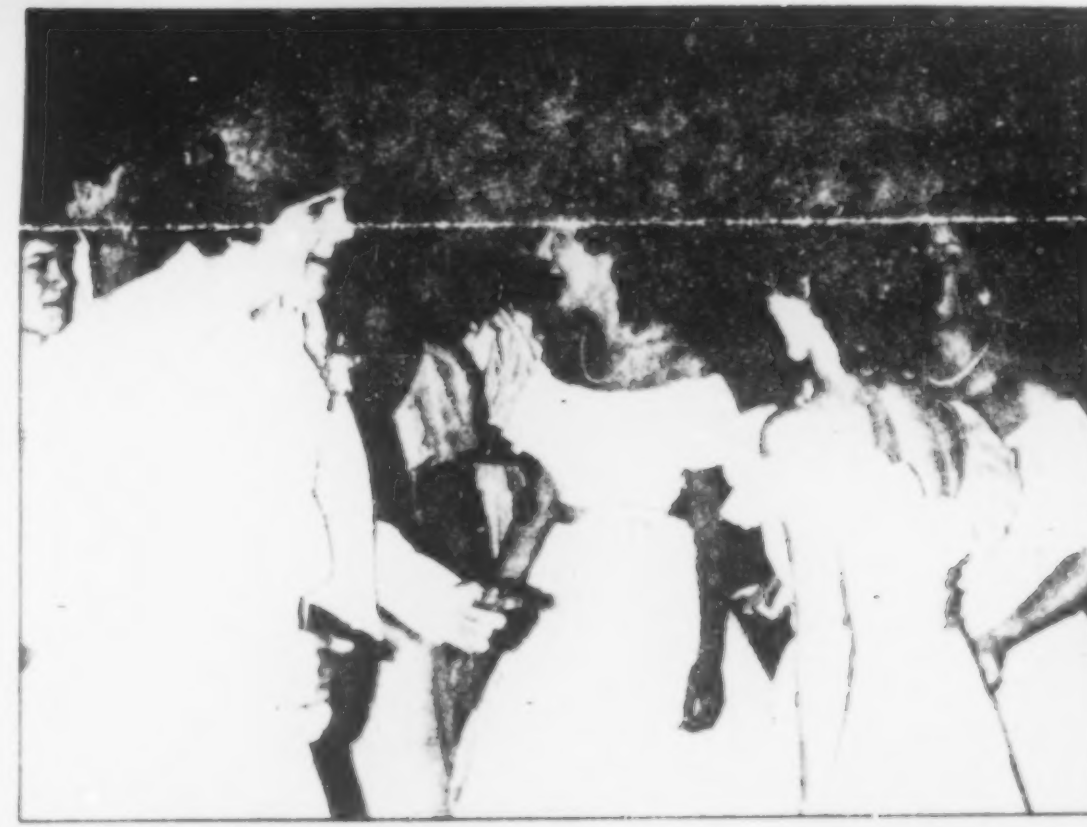
photo by Brisk

ELEGANT EATERS? Kim Roberts, Junior, and Freddie Quinn, Senior are served food from the buffet which was provided at prom.

photo by Brisk

CLASSY DANCERS—Elegantly dressed students enjoy the music provided by Stash.

photo by Brisk



Season to open for job hunters

by Angela Stamps

For many job hunters, the coming of summer signals the start of the hunting season. For students and faculty, the yearning for extra income begins to bud with warm weather. When the warm summer months go away, students and faculty pack away this temporary job and return to the routine of school.

Just what is at the root of this growing need for a temporary occupation? Teresa Booth, junior, explained, "I need to save money for college and other things I am going to need for my future career."

Mr. Alan Buxbaum, English teacher, joked, "It keeps me out of trouble!"

Susan Voss, junior, revealed, "I want to save money to get a nice car."

Still, the most basic reason for searching for a temporary job was summed up in one word by Mr. Graham Weir, English teacher, when he stated, "Money!"

When is the best time for a job hunter to start the hunt? Teresa advised, "The best time to look for a job is in May, when some of the seniors decide to go to some summer college to get the basics in. While they're doing that, your chances for finding a job are better."

However, Lisa Lind, senior, disagreed. "I think since all the college students come home they get their old jobs back for the summer."

Miss Mary Lundy, English teacher, starts her search a bit earlier. "Usually, March is always a time for me to think about summer work," she said.

Mr. Fred Davis, counselor, is currently in the business of helping those students who are seeking a summer job. "A lot of these jobs may be centered in one place. For example, Six Flags has 2,800 openings," he said. "There are jobs available if you want them bad enough," he added.

These summer jobs can vary greatly from person to person. Mr. Weir admitted to having a green thumb when he said, "I've been a gardener for the past six years."

Miss Lundy said that she works at Casual Corner, a woman's clothing store.

However, some teachers stay at East throughout the hot summer months. "I teach summer school right here," Mr. Buxbaum stated.

Working at a summer job is advantageous in more ways than one. Personal satisfaction from working can equal—and sometimes even surpass—the actual amount of money derived from a paycheck. Miss Lundy agreed by saying, "Summer jobs

are great because they provide a routine which helps one feel productive." She went on to say, "I consider myself lucky because I really like what I am doing."

Despite this, there are those who will not get to experience this personal satisfaction, as obtaining a job can be quite difficult. Experience is the key ingredient needed to unlock the door to a new job. Being a fresh, inexperienced face in the race for occupations can be a huge hurdle. The state of the economy can also take some of the blame for the inavailability of jobs—not only for high school students, but for everyone in general. Mr. Buxbaum declared, "There probably won't be as many summer jobs as in previous years because the economy is tight and there just aren't as many jobs available."

Those who already have summer jobs are very fortunate. Mr. Buxbaum observed, "It would be hard to get one if I didn't already have one."

Summer plans to include an assortment of events

by Michele Byram

When school lets out and summer vacation begins, people have many different plans for their spare time. These plans differ from working a part time job to going to Florida. "I want to have a very exciting summer here with all my friends before I go away to college," said Julie Adams, senior.

Donna Viehmeyer, junior, plans to get a full time job as a lifeguard. She also said, "I'm looking forward to laying out in the sun."

Summer vacation is also a time for visiting distant relatives. Miss Teri Gaby, math teacher, plans to visit her parents in Chicago.

"The first two weeks of summer I'm going to recuperate from the graduation parties, then I'm going to look for a job," said Greg Cremeens, senior.

Summer is not always a vacation as in the case of Miss Debbie Falkner. She plans on going to graduate school to get her Masters in Education Administration/Secondary Level. She plans to attend Kirksville for ten weeks. "After spending the summer in Kirksville, I'm going to deserve a vacation," added Miss Falkner.

"I'm planning on playing baseball and working at Twellman's over the summer," said Steve Range, sophomore. Other students also plan to work over the summer. A few of the common part-time jobs are held at Naugle's, York Steak House, Boyds and McDonald's.

"Over the summer my friends and I plan to run to stay in shape for cross country," said Mark Taylor, sophomore.

Tina Toarmina, junior, agreed with Mark, "I plan on staying in shape over the summer by walking or riding my bike home from cheerleading practice three times a week."

Other students also plan to go to graduation parties, such as Rich Luptowski, junior. "I plan to compare these graduation get togethers of '83 to the bashes of '84."

Editorial

Proposal to lower youth wages deserves rejection by Congress

In Jan. 1983, President Ronald Reagan proposed, in his State of the Union Message, a lowering of the student minimum wage.

His proposal would lower the minimum wage from \$3.35 per hour to \$2.50 per hour from May 1 to Sept. 30 and is applicable only to persons 21 or under. His purpose is to give more youths an opportunity for summer employment and to eliminate the barrier that the adult minimum wage has created for youths.

However, we, the *Spectrum* staff, hold a position in line with the labor unions who feel that this proposal would allow employers to replace older workers with youths at lower wages.

We feel that the employers could take advantage of the proposal, if passed, by firing the older workers and hiring younger ones in their places. In addition, the quality of workers would decrease because of the constant hiring of younger workers.

Younger workers should not be deprived of the full rights available to adult workers. If a younger person is willing to take on the responsibility of a job and does it well, then he should receive the same wages as other workers.

The teenage years are a very expensive time of life. With automobiles, insurance, school and college costs and leisure activities, job income can disappear quickly. In our opinion, we feel that many younger people feel that it isn't worth working for a lower wage.

Our opinions seem to be in agreement with Congress' actions in 1977 when a similar proposal was rejected. We feel that the same actions should be taken this year if the proposal does reach Congress.

News Briefs

- The Spring Sports Banquet will be held from 6:30-9 p.m. on Tuesday, May 24, in the commons. Tickets will be on sale for \$2.50 in the activities office a week before the banquet.
- The Fine Arts Banquet will be held from 6:15-9 p.m. on Thursday, May 26, in the commons. Tickets may be bought in the activities office for \$2.50 a week before the banquet.

- Students interested in trying out for Show Choir should meet after school from Monday, May 23-Wednesday, May 25, in the auditorium.
- The Student Council election packets for all positions are available from April 18-22 in the activities office from Mrs. Woley.
- The Student Council elections will be held first, second and third hour on Friday, April 29, in the auditorium. Juniors will be let out of class during first hour, sophomores during second and freshmen during third.

- The Hazelwood PTA Scholarship Run/Walk will be held at 8:30 a.m. on Saturday, May 21, for the one-mile run and 9 a.m. for the 3.1 and 6.2 mile. If you are interested in entering, check in the guidance office with Mr. Tom Bick, counselor, for more information.
- Permanent walls will be built this summer in the science and shop areas to create more privacy and reduce noise. The extra walls will go into the English and Social Studies departments.

- A free spring concert will be given by Girls' Choir, Concert Choir and Show Choir, from 8 p.m.-9:30 p.m. on Thursday, May 19, in the auditorium.
- After Friday, May 13, the library will be open only for quiet study. No materials may be checked out after this date. The library will be officially closed after Friday, May 20, except to those who have fines to pay.

Spectrum

Editor-in-chief Bill Becher
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Copy Editors Beth Conley, Jennifer Pemberton
Columnist Linda Von Till
Reviewers Joe Meinkoth, Leslie Smart
Cartoonist Leanne Tippet
News Editor Steve Brisk
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Spectrum is published approximately every three weeks by students in the Journalism II class and printed by Messenger Printing Company in Kirkwood, Missouri.

Spectrum maintains a price of 25 cents per issue. *Spectrum* will be sold during school hours at a time to be announced prior to its release.

Spectrum encourages all student, faculty and community input. Letters-to-the-editor should be under 300 words and signed by the author. Letters should be submitted to room 3116 in the IMC area.

Spectrum is a member of the Columbia Scholastic Press Association, the Missouri Interscholastic Press Association and the National Scholastic Press Association. *Spectrum* earned First Honors in the 1982 MIPA ratings.

Letter to the Editor

Dear Editor,

I would like to see an article concerning the unfairness of drill team and cheerleading tryouts in the *Spectrum*. It is a subject I personally feel very strongly about and I think that others should be informed of it.

There are many policies in this area that need to be changed. There should be impartial judges, people who don't know those trying out or care to. This way, people would be chosen on the basis of their ability.

The next would be to get the

sponsors more involved in the activities. They should give their opinion as to the performances given in order to make them better, not to mention their opinion on the "things" they do in uniform while representing our school.

Bear in mind that this is only my opinion, others may not feel as I do. I hope that you, the *Spectrum* staff, will do some investigating into this matter.

Thank you.
Sincerely,
A Concerned Sophomore

Editor's Note

Mrs. Peggy Peterson, drill team sponsor, replied, "How can you be more impartial in final cuts than having judges that are not in school here. The judges are ex drill team officers from years past who know the style of drill team and therefore know what to look for."

Ms. Teri Gaby, cheerleading sponsor, replied, "I think the judges are as impartial as they can be although they may know some of the people trying out. Cheerleaders have guidelines to follow and, in this school, the rules are enforced."

At the Movies

by Leslie Smart and Joe Meinkoth

The following is a summary and critique of recent films. The rating system is as follows:

- *****Academy Award winner for sure
- ****Worth four bucks
- ***See it at the matinee
- **Bring a pillow (ZZZZZZ)
- *DEMAND cash refund

What a feeling is the theme song to *Flashdance* (PG). It is an appropriate theme song for this movie. The action is fast and fantastic. Jennifer Beals plays a young dancer-welder who wants to become a ballet dancer. I honestly went into this movie expecting to see trash, but I came out with a broad smile on my face. The acting wasn't terribly good. There was no real concrete plot. The smoggy scenes of downtown Pittsburgh weren't pretty either. However, that doesn't really matter. The dancing scenes were enough to make this movie grand. Many of the dance scenes were like the ones on M-tv. They are very theatrical, unique and simply out of this world. Mike Nouri and Belinda Bauer also starred in this movie. If you enjoy dance style-movies then this movie is a must. Now showing at the Halls Ferry 8. ***** (Leslie Smart)

East journalists take 10 awards

by Steve Brisk

Several Hazelwood East journalism students attended the Missouri Journalism Awards Day at the University of Missouri-Columbia on April 19.

The students left with 10 awards—six for the yearbook, the *Pegasus*, and four for the newspaper, the *Spectrum*. The *Spectrum* also received first honors in Missouri with a score of 82 out of a possible 100, as judged by the Missouri Interscholastic Press Association.

The students who won yearbook awards were Kathy Huckaby, senior, honorable mentions for stories on public affection and Mu Alpha Theta, a third place with Bob Mitchell, senior, for non-portfolio layout; Sue Lee, senior, a third place for opening section mood copy; Mike McLean, senior, a third place for sportswriting; and Greg Jameson, junior, a third place for color photography.

Your Turn

Since summer employment is rapidly approaching, how do you feel about President Reagan's proposal to lower the minimum wage for youths to \$2.50?

It's a waste of time to work for less than today's minimum wage. —Randie Ham (12)



\$2.50 an hour doesn't go as far as \$3.35 an hour in today's economy.

—Elizabeth Boyle (12)

I think it stinks. Even with \$3.35 an hour, it's hard to make it, especially with a car, if your parents can't help.

—Dwayne Royston (12)



Fifties fashions and styles return

by Joe Meinkoth

Is it 1963 or 1953? This is the question lately. As the saying goes, "History is bound to repeat itself" and so far that saying is true even today.

The history that is repeating is the golden years of the 1950's. Fifties music, dress and overall styles are returning. Mr. Alan Buxbaum, English teacher, explains, "They are returning in many ways, such as music like the Stray Cats and the dress. The main thing I remember from the 50's is probably the early rock on American Bandstand. Bands like Danny and the Juniors and Jerry Lee Lewis."

Those bands and many others were popular in the 50's because of their styles. It was a style that was easy to move or dance to. The modern day new wave music follows this same style.

Television first became popular in the 50's. According to Time-Life books, by 1953, 32 million people owned sets and junior high

students spent close to 30 hours per week watching it. Shows like "I Love Lucy," "Gunsmoke" and "Leave It to Beaver" were ratings toppers in the 50's and are still being shown today.

Fashion of the 50's included polka dot blouses, circle skirts and capri length jeans for the ladies. For the manly look of the 50's, one might consider wearing loud Hawaiian shirts, baggies or skinny ties with their suits. Mrs. Jane Huff, English Department Chairperson, explains about the fabulous fashions of the 50's, "I think the 'preppy' look, like plaid skirts and crew neck sweaters, look a lot like 50's fashion. However, I hope felt skirts with poodles on them never return," she jokingly added.

The 50's were a carefree time. However, the threat of nuclear war was present and, although not known, one big fad was building bomb shelters.

No person is sure yet about the

return of those golden years of the 50's, but all the evidence of fashion, music, fads and television shows proves positive and like the old saying goes, "History is bound to repeat itself."



THE CAT'S MEOW—Brian Setzer, lead singer of the group the Stray Cats, shows the return of the 50's in his appearance and music style.

'84 cheerleading squads chosen

by Leslie Smart

Congratulations are in order. The 1983-84 cheerleading squads have been chosen. They are as follows: Varsity: Caryn Bonnell, co-captain; Amy Zesch, co-captain; Cassandra Case, Janet Ross, Julie Twillman, Nancy Neumarker, Tina Toarmina, Becky Bruggemann, Bonnie Boyle, Beth Whisler, Stacy Sloan, Susan Yeargain, Cheryl Haywood, Beth Bergmeier, Robyn Allison, Ludy Celis and the alternates Beth Naeve and Michele Byram. Sophomore: Amy Bauwens, Kim Becker, Melanie Byram, Cyndi Kiefer, Laura Keith, Karen Moore, Wendy O'Loughlin, Kim Robinson, Chris Shreve, Jeanine Smith and the alternates Jean Moxey and Emm-

ette Manalang, Freshman—Karen Boyle, Stephanie Gander, Stacey Hamill, Angie Schnur, Lisa Smith, Tara Sykuta, Dee Dee Underwood, Renee Walkner and alternates Katie Boyle and Linda Hilderbrand.

This is only the beginning for these fortunate girls. They have a long, hot, summer ahead of them. The Varsity squad will practice three mornings a week for two hours a day all summer. The sophomore squad's practice session won't be as long. They will practice from 7:30 a.m. to 9:30 a.m. two days per week, all summer long. The freshmen session don't start until July, but their sessions are three days a week, two hours per day.

Besides practicing, the Varsity squad will probably go to camp. They will go either to University of Missouri or Southwest Missouri State University. At camp they will learn new chants and new cheers. The sophomore squads won't be going away, but they will attend a clinic. They, too, will learn new cheers and chants. The freshmen won't go to camp, but they will learn new chants and cheers with special help from the Varsity and Sophomore squads.

After this long and hot summer, the Hazelwood East 1983-84 cheerleading squads will be ready to represent East with a smile and a cheer.



1983-84 VARSITY CHEERLEADING SQUAD—Bottom row: Ludy Celis, Bonnie Boyle, Becky Bruggemann, Beth Whisler, Susan Yeargain, Cheryl Haywood, Stacy Sloan, Beth Bergmeier, Robyn Allison.

Top row: Janet Ross, Beth Naeve, Julie Twillman, Tina Toarmina, Michelle Byram, Amy Zesch, Cassandra Case, Nancy Neumarker. (Not pictured: Caryn Bonnell) photo by Jameson

Hypnotism aids people; subjects find it relaxing

by Dawn Wolfe

When someone mentions the word hypnosis, most people have visions of a nightclub magician swinging a gold chain tantalizingly before their eyes.

However, hypnosis is not what most people think it is. A lot of skepticism is centered around hypnosis and a lot of this is derived from television people who, after being hypnotized, are usually shown as having the hypnotist make them perform strange tasks.

But this is not true. "A hypnotist can't make you do anything you don't want to do. He's just an instructor or a guide," stated Mr. Bill Paris, a hypnotherapist from the Certified Hypnotists Service. "You bring about this altered state of consciousness within yourself."

When someone goes to a hypnosis session, the hypnotist tries to get the person to totally relax to allow some changes to come about. The person is supposed to concentrate on one thing and focus all of his attention on that one item so his mind won't wander. Then he will become comfortable and go into a hypnotic trance. Mr. Paris said, "What you are attempting to do is reeducate the client in terms of his abilities. In other words, a new philosophy on life."

Dr. Robert Schlitt, a psychologist at Barnes Hospital,

said, "It's a disguised language that the person's unconscious understands, but the person doesn't. You're bringing about change without the person realizing it."

Admittedly, hypnosis sometimes fails. "Lack of motivation on the client's part, the client needs his symptoms and refuses to give them up, or a lack of skills on the therapist's part are a few of the reasons."

On the contrary, failure wasn't the problem for Mr. Mark Dressler, basketball player for the Missouri Tigers. He underwent hypnosis before the Tigers' played against Colorado in the first round game of the Big Eight Conference basketball tournament. Mr. Dressler scored 24 points in the 14 minutes he played in the Tigers' 88-73 victory. "I think we're going to give it another try," he said. "I don't know if it was the trick or not, but something worked." Also Mr. Dressler commented, "It's not damaging. I was aware of everything that was going on."

Hypnosis can be used in many helpful ways. For instance, it is used for the elimination of bad habits, weight loss and solving crimes. Even dentists are using it. Roughly, 70-90 percent of the population has the capacity to be hypnotized.

Youth may be growing up at a younger age

by Christine DeHass

Have you ever noticed the increasingly younger attendants at rated R movies or glanced at a couple holding hands and were shocked to see that the lovebirds could be no older than 13?

Are America's kids growing up too fast?

As told to the magazine, *America* Niel Postman, a professor of media ecology of New York University, said, "It seems that the producers of television and advertising, the makers of clothing and cosmetics, the judges in juvenile courts and the writers of juvenile novels are all conspiring to erase the distinction between children and adults."

A research project called the Children's Time Study, done from 1976 to 1981, revealed that watching television is a popular activity among high school students.

"By the time children finish high school, they have spent 11,000 hours in the classroom and roughly 65,000 hours outside. During that

time they have watched about 15,000 hours of television—the dominant out-of-school activity," as the *America* magazine explained.

Another factor in children's activities is the parent-child relationship.

An article in *The Serious*

Business of Growing Up, quoted a study which stated that of the 19 estimated hours an American parent spends with their children a week, half of those hours were spent simply doing something in the child's presence.

Mr. Don Rieger, psychology

teacher, explained, "Parents are more lenient today or kids just don't care."

As far as an overall reason, he believes it is due to a "change in social attitudes over the past 10 to 20 years. It's more relaxed today."

Lynn Nichols, junior, agrees that children are doing things at a younger age. "My older sister complains that I get to stay out later than she did and started to date at 15. My little sister gets to do things that I didn't get to do at her age. I think children should all be treated fairly while they're growing up."

With similar feelings, Darren Marhanka, junior, explained, "He (little brother) gets to run around outside on weeknights and doesn't get in trouble like I did. Kids are more involved in things today."

Whether or not the attitudes of children and their activities are dangerous to their upbringing, society is changing and children are changing with it.



STEADY DRIVERS—Sophomores Peggy O'Neil and Doug Lutz prepare to take the wheel in drivers education class. photo by Daniels

After winning Conference meet; girls' track strides toward State

by Ronald Thomas

The defending state champion girls' track team won the Suburban North girls' conference meet for the third consecutive year. "The competition gets better and better each year," commented girls' track coach Larry Milam. The Spartans were to host one of the 4A districts Saturday, May 7. "We should win the district meet. We're really just running against the same girls in our conference," stated Kim Shephard, junior sprinter.

The Spartans edged Hazelwood Central for the conference crown and league championship by the slim margin of 108-110. "Hazelwood Central really snuck up behind us," added Coach Milam.

The Spartans captured six first places led by triple winner Donna Ellerson, senior jumper. The

shall and Tamika Foster who won with the time of 4:09.7.

BOYS VARSITY TRACK

"Lack of participation really hurt us this season," commented boys' head track coach Buster Delaroche. The Spartans are concluding a struggling season, as they tied for fifth place in the Suburban North conference meet Saturday, April 30. "We hope to do better in districts," stated Robert Lawrence, senior sprinter.

"The team looks mentally prepared for districts," added Coach Delaroche. Hazelwood East was to host one of the 4A districts Saturday, May 7. The Spartans won the Vianney Relays for the second consecutive year by edging undefeated McCluer 65-52. "At least we can say we beat McCluer once," commented miler David Cameron, senior. At the conference meet, the Spartans ended tied for fifth place with Riverview Gardens with 51 points. "Fifth was the best we could do," added Coach Delaroche.

McCluer went on to claim the conference crown and league championship by edging the Ritenour Huskies by the score of 116-2-90. The Spartans were led by seniors Robert Lawrence and David Cameron who combined with Vince Hayes and Foris Webb to capture East's only first place with the 3200-meter relay.

Other runner-ups include Robert Lawrence in the 300 intermediate hurdles, David Cameron in the 800-meter run, and Asa Young in the discus throw. Leading the way in the Vianney Invitational Relays with first places were Calvin Raymond in the fat-man 100 meter dash, Asa Young in the discus throw and Hayes, Lawrence, Webb, and Cameron in the 3200 relay.



ALL ALONE— Tamika Foster, junior, strikes out the 400 meter run.

photo by Brisk

"The competition gets better and better each year."

defending state champion won all three jumping events and anchored the 400-meter relay who finished second to Riverview Gardens. Other runner-ups were Kathy Collier in the triple jump and Tamika Foster in the 400-meter run.

East also captured three firsts and one second out of four relays. The 3200-meter relay with Chris Benton, Eartha Booker, Jessica Harber and Pam Marshall won with the time of 10:02.0. Also victorious was the 400-meter relay with Kathy Gollier, Janet Ross, Barb Wilson, and Donna Ellerson with the time of 51.0.

The Spartans also won the mile relay (1600-meter relay) with Janet Ross, Eartha Booker, Pam Mar-

FINISHING STRONG—Vince Hayes, senior half-miler, stays in a strong second place behind a Hazelwood Central opponent.

photo by Brisk



FANCY FOOTWORK—Cassandra Case, junior midfielder, turns the ball up field against a Riverview defender. East defeated Riverview, 2-0.

photo by Jameson

Baseball up and down; despite consistent hitting

by Bill Becher

The varsity Baseball team was expected to play Tuesday afternoon against defending 4A State Champion Hazelwood Central. Even though the Spartans were up against the two-time state champs, they were very optimistic about the game and districts. "If we all work together and hit like we have been, we have a chance to take districts," commented Keith Sanders, junior pitcher.

During the regular season the Spartans lost three times to Central including an extra-inning defeat. "Central has a good team, we've gotten behind in the first few innings and can't catch back up," said third baseman Mike Kuetemann.

The Spartans defeated Rosary 5-4, behind the pitching of Joe Baldi, and Keith Wamhoff, and then downed Pattonville 4-2, with Tony Jones on the mound.

Keith Sanders pitched his best game of the season against McCluer striking out nine while giving up only one hit in the 10-0 victory.

It took the Spartans 12 innings to

defeat Riverview 8-7. After 11 innings the score was tied at six. The Rams scored one in their half of the twelfth. With one on and one out in the bottom half, Dave Stauss smacked his second homerun of the season giving the Spartans the win. Sanders, who took over for Wamhoff in the sixth, finished the contest for the win.

Stauss, who is only a junior, leads East with a 470 batting mark. He is followed by Gary Evans, senior, who is batting .420.

Sanders is also having a fine season, batting .410, while posting a 4-3 mark on the hill. Jones, who is also a junior has a record of 3-2. "Our hitting has been strong all year. A lot of guys have had a pretty good year with the bat," commented Head Coach Ken Green.

The Spartans have an overall record of 8-7 and are 6-5 in conference. "We've been a very streaky team this year. Sometimes we win four in a row and then we turn around and lose three straight. With a little more consistency, we could have had a better record," concluded Stauss.

Varsity kickers strive for consistency; conference swim meet to be at East

by Jim King and Mike Kuetemann

"Our main objective is to be consistent in our team play," said Mr. Dale Harmon, varsity soccer coach.

The Spartan's record stands at 8-1-4 and 3-0-1 in conference. "I think that we have the potential to play a lot better than our record shows. I know we will pull through," said Lisa Petty, senior forward. Jill Lamp, junior goalie, had a similar comment. "I don't think we are playing as well as we're capable of playing."

East suffered its first loss at the hands of Hazelwood Central, 3-1. The girls then defeated Pattonville 1-0; Ritenour 3-0 and Parkway Central 8-1. East also tied Rosary twice, 1-1 and 0-0.

The big scoring threat of the Spartans is Lisa. She has already passed up last season's total goals with 17. Other leading scorers for East are Judy Hoynacki, sophomore forward, and Robin Shelton, junior forward. Coach

Harmon also commented about the good defensive play of Teri Frederickson, sophomore defender, and the goalies; Angie Ehling, senior, and Jill.

"We play well as a team and we have had an equal balance of offense and defense plus good goaltending," said Coach Harmon, about reasons for the team's success.

The Spartans will play host to Hazelwood Central today, at 4:00 and then play in the Metro Tournament May 16-21. They finished second in the same tournament last year, which is like the state tournament.

GIRLS SWIMMING

With a 6-2 nonconference record and a 5-1 conference record the girls swim team seems to have another terrific season. Jennifer Chase, Jill Sanders, Linda Vogan and Lisa Goethe qualified for state in the free style relay with their fastest time of 4:09.65. Lisa Goethe

dominated by placing her best time this year in the IM 2:27.90 against McCluer. Linda Vogan swam runner up in the 100 free with a 1:09.25, also against McCluer.

East held a tri-meet here Wednesday, May 4, against Parkway West and Mary Institute. East placed third in the meet. "We were up against some good competition in this meet. Parkway West were the State Champions last year, but some people got their best times," said Laura Eble, freestylist.

The State meet will be May 20-21 and conference championships will be held here on May 13-14. "Right now, our team goal is to bring down each individual time. If successful, we have a good shot at finishing among the top three," said Coach Bill Batke.

Among the teams' losses, East lost to Pattonville, the only other team to have a perfect record. Also McCluer North has a strong but underrated team and could do some damage in the conference meet.

Tennis team looks at a shaky season; young golfers struggle under pressure

by Mike Kuetemann and Bill Becher

After coming off a close loss to Riverview, the boys' Tennis team came back to beat both Ritenour 5-2 and St. Charles 6-1. East added another win against Aquinas. The doubles team of Brian Shannon and Kevin Shaw beat Hazelwood West 6-2, 7-5, and then lost to Hazelwood Central 6-3, 6-0 in the recent conference meet.

Although East's season was not the best, it did serve a good purpose. "We should do a lot better next season now that many young players have had varsity experience," said sophomore Brian Shannon.

East is participating in the Country Day Tournament that will be tomorrow.

GOLF

"We're very young and we don't know how to golf under pressure too well," explained Rodney Sneed, sophomore. The Spartans tied for fifth in the Suburban North Conference meet at St. Andrews.

"We should do better now that many have had varsity experience."

East tied for fifth with McCluer North with a total of 433, just behind fourth place

Ritenour, 432. Hazelwood Central won the meet with a score of 403, followed by Pattonville 416 and Hazelwood West 425.

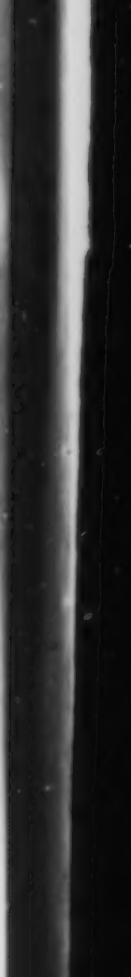
Rich Schroeder, senior, tied for tenth in the meet with an 83. He finished 11 strokes behind the leader.

Riverview, once again, upset East by one shot in head-to-head play 266-267. Schroeder shined for the Spartans, shooting a 40, at North Shore.

The Spartans also lost to Hazelwood Central, who is the powerhouse in Suburban North golf 249-271. Medalist for East was Bob Atkinson, who shot a 43 at Paddock.

"Our biggest problem is the inconsistency," said Rich Schroeder.





PETITIONER'S BRIEF

①
No. 86-836

Supreme Court, U.S.

FILED

MAR 30 1987

JOSEPH F. SCHMIDT, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

VS.

CATHY KUHLMIEIER, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Hazelwood East *Spectrum* is a school-sponsored high school newspaper produced and published by the Journalism II class. The principal prohibited publication of articles that profiled pregnant students and contained quotations by students citing reasons for their parents' divorces. The district court found the principal's actions constitutional in that they were reasonable and viewpoint neutral. The court of appeals reversed, holding that *Spectrum* is a "public forum" and that, therefore, the principal could only prevent publication of the articles at issue if their publication would subject the school to tort liability.

The questions presented are:

1. Is a school-sponsored high school newspaper produced and published by a journalism class as part of the school adopted curriculum, under its teacher's supervision and subject to the principal's review, a "public forum" for purposes of the First Amendment?
2. If so, may school authorities act to prevent "invasions of the rights of others," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), by school-sponsored newspapers only when failure to do so would subject the school to tort liability?
3. By prohibiting publication of the articles at issue, did the school authorities act in a manner consistent with the First Amendment to protect the privacy of students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, to limit the school-sponsored publication to materials appropriate for high school age readers, and to insure fairness to the divorced parents whose actions were characterized?

LIST OF PARTIES

The petitioners before this Court are the Hazelwood School District, Dr. Thomas S. Lawson, superintendent of the Hazelwood School District, Dr. Francis Huss, assistant superintendent of the Hazelwood School District, Robert Eugene Reynolds, principal of the Hazelwood East High School, Howard Emerson, a teacher in the Hazelwood School District, and the following members and former members of the Hazelwood School District Board of Education: Charles E. Sweeney, Joseph E. Donahue, Gwendolyn L. Gerhardt, August A. Busch, Jr., Ann Gibbons, and James E. Arnac. These petitioners were also parties below. The respondents, also parties below, are Cathy Kuhlmeier, Leslie Smart, and Leanne Tippet West. The Student Press Law Center, Journalism Education Association and the St. Louis Globe Democrat, Inc. entered appearances in the proceedings below as amici curiae.

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No. 86-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

CATHY KUHLMEIER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 795 F.2d 1368 (8th Cir. 1986) and is reprinted in the Appendix to the Petition for Writ of Certiorari. (App. A-1). The memorandum decision of the United States District Court for the Eastern District of Missouri (Nangle, C.J.) is reported at 607 F.Supp. 1450 (E.D.Mo. 1985) and reprinted in the Appendix. (App. A-23).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on July 7, 1986. Petitioners sought rehearing and rehearing en banc. The petition for rehearing was denied

on August 27, 1986. The petition for writ of certiorari was filed on November 22, 1986 and granted on January 20, 1987. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Hazelwood School District operates public elementary and secondary schools within the State of Missouri, including the Hazelwood East High School. On August 19, 1983, respondents, former students in the Journalism II class at Hazelwood East, brought this action for declaratory relief pursuant to 28 U.S.C. §§2201, 2202, and damages pursuant to 42 U.S.C. §§1983, 1988.¹ Respondents alleged that their rights under the First and Fourteenth Amendments had been abridged by petitioners' refusal in May 1983 to permit publication of certain articles in the Hazelwood East *Spectrum*, a school-sponsored newspaper produced by Hazelwood East's Journalism II class.

On May 9, 1985, after a three-day trial to the court, the Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri, held respondents' First Amendment rights were not violated when petitioners prohibited publication of articles containing "personal accounts" of pregnant high school students and students' explanations why their parents divorced. He found that petitioners reasonably acted to protect the privacy of the students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, to insure fairness to the divorced parents whose actions were characterized, and to limit the school-sponsored newspaper to materials appropriate for high school age readers.

During the 1982-1983 academic year, the Hazelwood East curriculum included two journalism classes, "Journalism I" and "Journalism II." Enrollment in Journalism II required successful completion of Journalism I. Students in Journalism I were taught the fundamentals of reporting, writing, editing,

¹ The district court had subject matter jurisdiction by virtue of 28 U.S.C. §§1331, 1343(3), (4).

layout, publishing and journalistic ethics. This instruction continued in Journalism II, but the primary activity of Journalism II was production of Hazelwood East's school-sponsored newspaper, *Spectrum*. "This activity is best described as a classroom exercise or 'lab' in which Journalism II students were given an opportunity to apply the knowledge and skills derived from the instruction they received." Appendix to Petition for Writ of Certiorari (hereinafter "App.") A-26.² The Hazelwood School District financed *Spectrum*, although newspaper sales to students defrayed approximately 25% of the costs of production during the 1982-1983 academic year. App. A-27.

The district court found that the teacher of Journalism II "both had the authority to exercise and in fact exercised a great

² The Hazelwood East Curriculum Guide described Journalism II as a course that "provides a laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I." The Curriculum Guide listed the following as the "main ideas" of Journalism II:

1. An experience for students to practice journalistic techniques learned in Journalism I by publishing the school newspaper under the pressures of pre-established deadlines.
2. the legal, moral, and ethical restrictions imposed upon journalists within the community.
3. responsibility and acceptance of criticism for articles of opinion.
4. leadership responsibilities as issue and page editors.
5. creative and imaginative layouts which present the news within an accurate, fair, and balanced format.
6. pride in the school newspaper.
7. journalism as a potential career choice.

App. A-26 to A-27; J.A. 11. The district court found that both Journalism I and II were taught according to the Curriculum Guide. App. A-27.

deal of control over *Spectrum*," and "was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." App. A-29. The teacher

selected the editor, assistant editor, layout editor and layout staff of the newspaper. He scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, counseled students on the development of the stories, reviewed the use of quotations, edited stories, adjusted layouts, selected the letters to the editor, edited the letter to the editor, called in corrections to the printer, and sold papers from the Journalism II classroom.

Id. The teacher assigned story ideas to particular students and specified the length of the proposed articles. (Trial Transcript (hereinafter "Tr.") 1-29, 1-80). After a draft was completed, the teacher

would review the article, make comments, and return it to the student to be rewritten or researched further. Articles commonly went through this review and revision process three (3) or four (4) times.

App. A-31. Each issue of the paper was also to be submitted to the principal for prepublication review. App. A-29 to A-30.

Members of the Journalism II class researched and wrote the two articles that prompted the instant controversy. They were to appear with other articles on pages 4 and 5 of a 6-page, May 13, 1983 issue of *Spectrum*. Joint Appendix (hereinafter "J.A.") 4-5. Three articles were to run along the top half of pages 4 and 5 and share a common headline:

Pressure describes it all for today's teenagers
Pregnancy affects many teens each year

The first article in this top group of three surveyed teenage sexuality and pregnancy, with statistics on birth control, paren-

tal attitudes, and abortion. The second article discussed a proposed "Squeal Law" that would require federally funded clinics to notify parents when a teenager sought birth control assistance.

The third article consisted of separate "personal accounts of three Hazelwood East students who became pregnant." The introduction to the article stated that "all names have been changed to keep the identity of these girls a secret." In each of the three accounts, the student discussed her reaction to becoming pregnant, her plans for the future, her relationship with the father, the reaction of her parents, and details of her sex life and use or non-use of birth control methods.

App. A-37.

The three articles along the bottom half of pages 4 and 5 were entitled "Teenage marriages face 75 percent divorce rate," "Runaways and juvenile delinquents are common occurrences in large cities," and "Divorce's impact on kids may have lifelong effect." The latter article

dealt with the frequency and causes of divorce, as well as the affect (*sic*) of divorce on children. The article contained a quote from a student who was identified only as a "Junior", as follows:

"My dad didn't make any money, so my mother divorced him."

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer,"

A Freshman identified by name as "Diana Herbert" gave the following quote:

"My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on

business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realized (*sic*) it wasn't me," added Diana.

Similar quotes were provided from students identified by name as Susan Kiefer and Jill Viola.

App. A-37 to A-38.

The student authors of the pregnancy profiles and "Divorce's impact" story used questionnaires to research their articles. Each subject was told the information would be used in *Spectrum*. The three pregnant girls were told their names would not be used. They were not given, however, any instructions regarding parental consent, and there was no evidence such consent was obtained. The parents of the students quoted in the "Divorce's impact" article were not "contacted to explain or rebut the quoted statements of their children." App. A-39.

The teacher of the Journalism II class, Mr. Robert Stergos, left the school district for private industry on April 29, 1983, and the district appointed a substitute teacher, petitioner Howard Emerson, to supervise the Journalism II class's publication of the last two issues of the year. On May 10, 1983, Mr. Emerson, pursuant to the established prepublication review procedure, submitted page proofs of the May 13 issue to the school principal, petitioner Robert Reynolds. As the district court found:

With respect to the personal accounts of three (3) Hazelwood East students who were pregnant, Mr. Reynolds was concerned that the girls had been described to the point where they could be identified by their peers. In addition, he objected to their discussion of their sexual activity.

App. A-42. As for the "Divorce's impact" article, Reynolds objected to the use of Diana Herbert's name and the students'

quotations about reasons for their parents' divorces. In particular, "he thought that fairness required that her parents be notified and given an opportunity to respond." App. A-43.

Mr. Reynolds asked Mr. Emerson what would have to be done to delete the stories in question and Mr. Emerson responded that pages 4 and 5 could be deleted and page 6 could be changed to page 4. Mr. Reynolds directed Mr. Emerson to effectuate this.

App. A-40. Reynolds' superiors, petitioners Lawson and Huss, concurred in his decision.¹

In analyzing the First Amendment issues, the district court distinguished between student speech "privately initiated and carried out independent of any school-sponsored program or activity," such as the black armbands involved in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and "student speech or conduct in the context of school-sponsored publications, activities or curricular matters." App. A-47 to A-48. In concluding *Spectrum* was a nonpublic forum, the district court noted that it was produced by members of the Journalism II class as taught by a faculty member in accordance with the Hazelwood East Curriculum Guide. A textbook was used and students received academic credit and a grade. The preparation of *Spectrum* was largely done during class. The district court found "the most telling facts are the nature and extent of the Journalism II teacher's control and final authority with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by Hazelwood officials in the past." App. A-54.

¹ After May 13, 1983, several copies of the deleted articles were circulated at Hazelwood East. Petitioners made no effort to stop this unauthorized distribution or punish the individuals responsible. App. A-46. A copy of the May 13, 1983 issue of *Spectrum*, as it was ultimately published, appears at pages 7-10 of the Joint Appendix.

Given that *Spectrum* was not a public forum, the district court held that school officials need demonstrate only that there was a reasonable basis for their actions. He concluded Principal Reynolds had a legitimate concern that the three girls featured in the pregnancy profiles could be identified, given the small number (8 to 10) of pregnant students at Hazelwood East and the specific information disclosed in the article. Judge Nangle also credited the judgment of Hazelwood East school authorities that this material — particularly in the context of a school-sponsored, curricular publication — was not appropriate for some high school age readers and might create the impression that the school district endorsed the sexual norms of the article's subjects. App. A-55 to A-56.

Similarly, Reynolds had legitimate objections to the "Divorce's impact" story because it related students' perceptions of the reasons for their parents' divorces without availing the parents an opportunity to object, respond or rebut these characterizations. App. A-56. As for deletion of all of pages 4 and 5, the trial court concluded that Reynolds reasonably believed that he had to make an immediate decision or no paper would be published, and that there was no time to make changes to the articles. App. A-40, A-55.

The United States Court of Appeals for the Eighth Circuit reversed. Judge Heaney, joined by Judge Arnold, held that *Spectrum* was a public forum "because it was intended to be and operated as a conduit for student viewpoint." App. A-5 to A-6. Applying what it perceived to be the teaching of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the court of appeals concluded that petitioners acted unconstitutionally because "the two articles objected to . . . could not reasonably have been forecast to materially disrupt classwork, give rise to substantial disorder, or invade the rights of others." App. A-2.

As for what the court of appeals characterized the “heart of this case” — the invasion of privacy concerns — it held that when the *Tinker* Court spoke of “invasion of the rights of others” it meant to refer only to tortious acts.

[S]chool officials are justified in limiting student speech, under this standard, only when publication of that speech could result in tort liability for the school. Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.

App. A-14.

The court of appeals concluded that the pregnancy profiles and “Divorce’s impact” story were not tortious. It noted that the students quoted in the “Divorce’s impact” article had consented to publication. As for the pregnancy case study, the court of appeals observed that even if it was possible to identify the girls,

[t]he only tort action which, conceivably, could have been maintained against Hazelwood East had the pregnancy case study been published is that of invasion of privacy. . . . Certainly the parents of the girls could not maintain this tort against the school because the article did not expose any details of the parents’ lives, only about the students, and they fully consented. Almost as inconceivable is the prospect of the fathers maintaining this tort action. The fathers were not named in the article, thus they could only be identified by persons who previously had knowledge of the revealed facts. Thus, there would have been no disclosure. We conclude that because no tort action based on the articles could have been maintained against Hazelwood East, school officials were not justified in censoring the two articles based on the *Tinker* “invasion of the rights of others” test.

App. A-15.

Judge Wollman dissented. He thought the district court’s findings amply supported the conclusion that *Spectrum* was not a public forum. He objected “to a collective first amendment right to publish a school-sponsored, faculty-supervised newspaper with the same lack of constraints enjoyed by the commercial press or, for that matter, a solely student-sponsored, extracurricular paper totally removed from the aegis of the school.” App. A-19 to A-20.

Respondents petitioned for rehearing, calling to the court of appeals’ attention this Court’s opinion in *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986), which reversed one of the principal authorities relied on by the panel. Rehearing was denied on August 27, 1983, with four judges (Ross, Fagg, Bowman and Magill) voting for rehearing en banc. App. A-21.

SUMMARY OF ARGUMENT

A school-sponsored high school newspaper produced by a journalism class, under a teacher's supervision and subject to the principal's review, is not a public forum. In *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439 (1985), the Court emphasized that the State's decision to afford selective access to a publicly-owned instrumentality does not transform it into a public forum. Courts must examine the state agency's policy and practice to determine whether that agency intended to designate the instrumentality as generally open for unrestricted expression.

A high school newspaper produced as a classroom exercise is incompatible with the concept of a public forum. In this case the journalism class, by design and in practice, was a laboratory situation in which the students worked on the production of the school-sponsored newspaper during a designated class period. The teacher selected the editorial staff from among the class members, determined publication dates, and dictated the size of each issue. He assigned story ideas to members of the class and specified how long each story should be. The teacher often required extensive revision of the proposed articles and he determined, subject to the principal's review, whether they would appear in the school-sponsored newspaper. He graded the articles and each student received a final grade and academic credit for the course.

Thus there was clearly no intent on the part of school authorities to make the school-sponsored newspaper an open forum for indiscriminate use by the journalism class, let alone the student body or public at large. The effect of the court of appeals' decision below is to convert an instructional device into a common carrier for student expression. It makes the teaching of journalism through school-sponsored publications impractical. This judicial revision of the curriculum conflicts sharply

with the solicitude this Court has historically demonstrated for the important governmental interest in local control of secondary school curriculum.

Moreover, the principal's decision to delete two pages of the school-sponsored newspaper did not "directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The First Amendment prohibits improper restraints on voluntary public expression. The journalism students were required to attend class and work on the newspaper. The teacher assigned the topics and required preparation of the articles that prompted this controversy. The expression that the principal restricted was, therefore, the product of the compulsory environment of the classroom. It was not the autonomous expression that implicates First Amendment values.

The district court properly concluded that the school-sponsored newspaper was a nonpublic forum and that the principal's excisions were a reasonable effort to protect the privacy of students featured in the articles and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, to prevent publication of materials that were inappropriate for high school age readers, and to insure fairness to divorced parents whose actions were characterized in the articles.

The deletion of the articles was not motivated by any desire to discriminate against a particular point of view. Therefore, the "substantial disruption/invasion of rights of others" standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), is inapplicable to this case. Nor does that opinion support the court of appeals' position that school authorities may act to prevent "invasion of the rights of others" by school-sponsored publications only when failure to do so would subject the school district to tort liability.

ARGUMENT

I. A SCHOOL-SPONSORED HIGH SCHOOL NEWSPAPER PRODUCED BY A JOURNALISM CLASS IS NOT A PUBLIC FORUM

In concluding that a school-sponsored high school newspaper produced by a journalism class is a "public forum," the court of appeals has announced a constitutional right of access that extends into the secondary school classroom. On a practical level, this result makes the teaching of journalism through a class-produced newspaper unworkable. In terms of legal analysis, the court of appeals ignored the public forum methodology that this Court utilized in *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439 (1985), and gave no weight to the important tradition of local curricular control recognized in cases such as *Ambach v. Norwick*, 441 U.S. 68 (1979), and *Board of Education v. Pico*, 457 U.S. 853 (1982). The court of appeals also failed to analyze the special nature of a secondary school student's "curricular expression" and, consequently, whether respondents' First Amendment rights were "directly and sharply implicate[d]" by the principal's actions in this case. When these considerations are weighed in the context of the Court's articulated public forum analysis, it is evident that *Spectrum* and similar curricular publications are nonpublic forums and subject to reasonable regulation by school officials.

A. Spectrum And The Public Forum Cases

The court of appeals found *Spectrum* was a public forum because "it was intended to be and operated as a conduit for student viewpoint." App. A-5 to A-6.

Although, as the district court noted, *Spectrum* was produced by members of the *Journalism II* class, its staff was essentially restricted to students of that class and *Spectrum* was a part of the school adopted curriculum, it was

something more. It was a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so. *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

App. A-9. In essence, the determinative consideration for the court of appeals was the "'wide variety of topics'" that had been featured in *Spectrum* in the past. App. A-10, quoting *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). It noted specifically that

Spectrum covered topics of general interest to the student body. Since 1976, it had published stories dealing with teenage dating, students' use of drugs and alcohol, the desegregation of the St. Louis schools, religions, cults, and runaways.

App. A-6.

That *Spectrum* was, among other things, an expressive vehicle for members of the Journalism II class is undeniable. But this Court has repeatedly emphasized that an instrumentality does not become a public forum simply because it is a vehicle "for the communication of ideas or information." *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 130 n. 6 (1981). In *Council of Greenburgh Civic Associations*, the Court held that a letterbox is not a public forum even though it is used for the communication of a wide range of ideas and information. Fort Dix was not transformed into a public forum open to political candidates despite "[t]he fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix" in the past. *Greer v. Spock*, 424 U.S. 828, 838 n. 10 (1976). A plurality of the Court in

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), concluded advertising space in transit buses did not become a public forum by the acceptance of a wide range of commercial messages. The Court has predicated the public forum analysis on a close examination of the purposes and mode of operation of the particular forum, not on the "variety of topics" that it has entertained. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 44 (1983).

In *Perry Education Assn*, the Perry Local Educators' Association brought suit challenging its exclusion from the internal mail system of the Metropolitan School District of Perry Township, Indiana. Its rival, the Perry Education Association ("PEA"), was the elected exclusive bargaining representative of the school district's teachers, and by the terms of the collective bargaining agreement, the PEA was the only union that could use the interschool mail system to communicate with the district's teachers. The Court held that the Perry Local Educators' Association did not have a right of access to the mail system because that system was a nonpublic forum and therefore subject to the school district's reasonable limitations on access.

The Court distinguished among three types of public property: the "traditional" public forum, the designated public forum, and the nonpublic forum. The traditional or "quintessential" public forums are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" 460 U.S. at 45, quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). With respect to these forums:

For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id. at 45 (citation omitted).

"A second category consists of public property which the State has opened for use by the public as a place for expressive activity." *Id.* The State is not required to create the forum and it can close the forum at any time. But as long as it remains open, the State is subject to the same restrictions that govern the traditional public forum. Moreover, "[a] public forum may be created for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects." *Id.* at 46 n. 7, citing *Widmar v. Vincent*, 454 U.S. 263 (1981); see *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).⁴ In *Widmar*, the Court held that a state university that makes its facilities generally open to extracurricular meetings of registered student groups may not close its facilities to a registered student group desiring to use them for religious discussion.

Finally, state property that is not by tradition or designation "a forum for public communication" is subject to extensive control. "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely

⁴ But cf. *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-81 (1984) (public forum is by tradition or designation "open for participation by the public at large").

because public officials oppose the speaker's view." *Perry Education Assn, supra*, at 46. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

In this case neither respondents nor the court of appeals have suggested that a school-sponsored high school newspaper produced by a journalism class is a "traditional" public forum for the journalism students, let alone the entire student body or public at large. The thrust of respondents' position, and that of the Eighth Circuit below, is that having chosen to teach journalism through a class-produced newspaper, the Hazelwood School District — and the hundreds of school districts which have made similar choices — have designated the newspaper a public forum and forfeited control over the journalism classroom. This result undermines the pedagogical function of the newspaper — interposing the First Amendment between a teacher and his class in the classroom — and ignores how that pedagogical function affects the public forum analysis. Specifically, it overlooks the significance of the selective access inherent in the operation of a curricular newspaper such as *Spectrum*.

In *Perry Education Assn, supra*, the Court concluded that the interschool mail system was not a public forum because the Perry School District had not opened its mail system "by policy or by practice" "for indiscriminate use by the general public."

Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This

type of selective access does not transform government property into a public forum.

Id. at 47 (emphasis added).

This Court again emphasized the significance of selective access in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439 (1985). The question in that case was whether the Federal Government violated the First Amendment by excluding legal defense and political advocacy organizations from participation in the Combined Federal Campaign ("CFC"), a charitable fund-raising drive directed at federal employees. The solicitation for the fund drive included a brochure that contained short statements prepared by the participating organizations.

After reviewing the analysis articulated in *Perry Education Assn*, the *Cornelius* Court observed:

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. . . . Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

105 S.Ct. at 3449. The Court emphasized that it "will not find that a public forum has been created in the face of clear evidence of a contrary intent. . . ." *Id.* at 3450. It noted that in *Perry Education Assn* this contrary intent was evidenced by the practice "to require permission from the individual school principal before access to the system to communicate with teachers was granted." *Id.* In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), contrary intent was apparent from city regulations limiting access to the advertising spaces on the city transit buses to commercial messages.

The *Cornelius* Court likewise concluded that the CFC was not a public forum.

The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is merely ministerial. . . . The Civil Service Commission and, after 1978, the Office of Personnel Management developed extensive admission criteria to limit access to the Campaign to those organizations considered appropriate. . . . Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.

Id. at 3450-51 (citations omitted).

By "policy and practice," screening and selective access were integral to the production of *Spectrum*. The "policy" of Journalism II was set out in the Curriculum Guide. The course was described as a "laboratory situation" in which the students were to learn, among other things: the "legal, moral, and ethical restrictions imposed upon journalists within the school community;" presentation of the news "within an accurate, fair, and balanced format;" and acceptance of criticism. J.A. 11-13. The teacher was to "[c]arry on a dialogue with each editor continuously as to the newspaper's content" and "[h]elp the staff turn bare ideas into well-researched, written, and edited stories." J.A. 20. Hazelwood School Board Policy 348.51 provided that school-sponsored publications "are developed within the adopted curriculum and its educational implications in regular classroom activities." J.A. 22.⁹

⁹ Hazelwood School Board policies distinguished between publication by the journalism class and privately-initiated speech. Board Policy 348.51 established guidelines to ensure access to school-sponsored publications such as *Spectrum* to students who were not

In practice, with the exception of the letters to the editor column, only members of the Journalism II class published articles in *Spectrum*. (Tr. 1-43, 2-19). With the exception of one student who had a class conflict, all members of the class met during a regularly scheduled class period to work on *Spectrum*. App. A-28. Even for these students, *Spectrum* was not an expressive vehicle for their "indiscriminate use." As the district court found, the Journalism II teacher "was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." App. A-29. He selected the editorial staff and determined publication dates and the size of issues. He assigned the story ideas and specified how long the stories should be. (Tr. 1-80, 1-118, 1-132, 1-144, 2-94). He approved investigative techniques. (Tr. 2-94). He "counseled students on the development of the stories, reviewed the use of quotations, edited stories, adjusted layouts, selected the letters to the editor, edited the letter to the editor, called in corrections to the printer, and sold papers from the Journalism II classroom." A-29. The teacher frequently required the student to revise his article as many as four times before it was published — if it was published — and the teacher often edited the final drafts himself. A-31. Members of the Spring 1983 Journalism II class who testified at trial emphasized that the

enrolled in the journalism classes. (Tr. 3-51). With respect to such privately-initiated speech, it cautioned school-sponsored publications not to "restrict free expression or diverse viewpoints within the rules of responsible journalism." It set out a procedure by which a student/faculty review board determined whether to publish a piece submitted by a student who was not enrolled in the publications class. Board Policy 348.51 also specified:

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the education process.

Board Policy 348.5 provided access to the school premises for nonschool-sponsored, privately-initiated publications. J.A. 22-23.

teacher ultimately decided what would be published.⁶ (Tr. 1-99, 1-125, 1-126, 1-132 to 1-133, 1-137).

This extensive regulation was part of the pedagogical method: screening and selective access were important instructional tools. An educational decision was made that the journalism instruction would be most efficacious if the teacher served as a de facto editor-in-chief: teaching journalism by forestalling publication until appropriate journalistic standards, as he interpreted them, were met. "In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students." *Ambach v. Norwick*, 441 U.S. 68, 78 (1979). One of the Journalism II students testified that she learned about

⁶ Despite these extensive findings of fact by the district court, fully supported by the record below, the court of appeals stated that the teacher "exercised minimal editorial control." App. A-2.

Although *Spectrum* was produced by the *Journalism II* class, it was a "student publication" in every sense. The students chose the staff members, determined the articles to be written and printed, and determined the content of those articles.

App. A-6. These statements are puzzling and wholly contradicted by the findings of the district court. Since the court of appeals did not find "clearly erroneous" any of the district court's factual findings on the policies and practices that governed *Spectrum* and on the extent of the teacher's control, the district court's factual findings are binding. See *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 856-58 & n. 20 (1982); see also *Minnesota State Board v. Knight*, 465 U.S. 271, 308 (1984) (Stevens, J., dissenting). The relationships of the teacher to the newspaper and the newspaper to the curriculum are not mixed questions of law and fact that warranted de novo review by the court of appeals. See *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1512 (1985). And the court of appeals certainly cannot reverse findings of fact *sub silentio*.

handling sensitive or controversial issues through the teacher's comments on her drafts of proposed articles. (Tr. 1-112 to 1-113). Respondents' expert witness, a professor of journalism at the University of Missouri, distinguished between a "curricular paper" such as *Spectrum* and an extracurricular newspaper, i.e., a student newspaper with little or no faculty supervision. He opined that the curricular paper was a "far superior" educational experience precisely because of the teacher's involvement. (Tr. 2-104).⁷

The district court also found that the principal reviewed *Spectrum* prior to publication pursuant to an established pre-publication review procedure. App. A-29 to A-30. The principal was the instructional leader at each school within the Hazelwood School District and the final authority on all matters of curriculum within that school. (Tr. 2-160 to 2-161, 3-19). The Curriculum Guide for Journalism II admonished that the teacher was to "[e]stablish a liason (*sic*) with the school principal and discuss frequent (*sic*) newspaper ideas and content to know what he expects." J.A. 20.

The lack of any intent to create a public forum is consequently much more apparent in this case than in *Perry Education Assn* or *Cornelius*. The regulation of access here is necessarily more pervasive and more closely related to the purposes of the forum. The public forum determination is wholly incompatible with the purpose and function of *Spectrum*. A decision in *Perry Education Assn* that the internal mail system was a public

⁷ He cited the following difference between the curricular and extracurricular newspaper:

I think the main difference is that you have a teacher, hopefully a trained teacher, who will guide the students, who will help them in the learning process about journalism, so that the students really are not just on their own. With the extracurricular paper, sometimes the students are pretty much on their own.

(Tr. 2-103).

forum would have increased the burdens on that system and risked some labor discord, but the system would have continued as a means of communicating the official business of the school system to its employees. A determination in *Cornelius* that the CFC was a public forum would have resulted in a more diffuse solicitation campaign and the loss of contributors offended by the participation of advocacy organizations, but it would not have changed the essential nature of the campaign. In contrast, denominating *Spectrum* a "public forum" dramatically transforms the forum itself from a pedagogical device to a common carrier for student expression.

B. Spectrum And The Traditional Concept Of Curricular Control

In substance, therefore, the Eighth Circuit's decision is a judicial revision of Hazelwood East's curriculum. For if the school-sponsored newspaper produced by a journalism class is a public forum, there is no reasonable latitude for the teaching of journalism in that context. Any limitation on the journalism student's "right to publish" would have to be justified by a compelling state interest. Is correction of bad grammar or poor syntax a compelling state interest? How can courts weigh the teacher's explanation that the story was not adequately researched, unbalanced or unfair? Either the courts will have to articulate what constitutes "good" journalism and declare conformance with this judicial code of journalism a compelling state interest or, more likely, take the position that any regulation by the teacher and his superiors is limited to narrowly defined areas such as obscenity and libel. In either case, the courts are supplanting the journalism teacher's role in the laboratory exercise, either by effectively removing him from the classroom and surrendering control to the students⁸ or by dictating what he must teach and how.

⁸ See *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3166 (1986) (disclaiming "any purpose . . . to hold that the federal Con-

Proponents of the view that a school-sponsored, curricular newspaper is a public forum concede as much. In *Reineke v. Cobb County School District*, 484 F.Supp. 1252, 1257 (N.D.Ga. 1980), a case cited with approval by the Eighth Circuit below (App. A-10, A-18), the district court held that neither technical defects in grammar or spelling, factual errors, "poor taste," nor "improper journalistic form" would permit the journalism teacher or school principal to forestall publication of a student article in a class-produced, school-sponsored newspaper. The teacher could not even modify an article with the consent of the author. *Id.* at 1258. The district court in *Reineke* held, as did the Eighth Circuit here, that the journalism teacher and his superiors were strictly limited by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969): the teacher can only prevent publication of a student article if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." With inadvertent irony the *Reineke* court added, "The newspaper was intended to be a learning experience for those students interested in journalism." *Id.* at 1262.⁹ What will these students

stitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students' "), quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 522 (1969) (Black, J., dissenting).

⁹ Similarly, the secondary source relied on extensively by the Eighth Circuit states:

A school has the power to set its curriculum, but where that curriculum is designed only to teach students the mechanics of writing and editing, curricular control should be limited to sloppy or ungrammatical expression, not expression dealing with "inappropriate" topics. The school might be able to limit coverage of a curricular newspaper to certain issues, but it cannot prescribe the nature of this coverage.

Note, *Administrative Regulation of the High School Press*, 83 Mich.L.Rev. 625, 633 n. 48 (1984). But how can journalism be "taught" without reference to the appropriateness of a topic and the

“learn” about journalism, accepting criticism, and responding to an editorial authority if *Tinker* is the standard for publication?¹⁰

The determination that a school-sponsored newspaper produced by a high school journalism class is a public forum therefore conflicts sharply with the traditional control exercised by local school boards, school administrators and teachers over secondary school curriculum. This interest must also be weighed in the public forum calculus. As Justice Blackmun observed for the plurality in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974):

Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

In *Lehman* the plurality noted that through its public transit system the city was engaged in commerce. The advertising spaces within the bus were “part of the commercial venture.”

In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit

manner in which an issue is covered? Presumably these very considerations distinguish a journalism class from a basic English class: the latter is predominantly concerned with “sloppy or ungrammatical expression.” And even if this forbearance by school authorities was sound educationally, why would it be required constitutionally?

¹⁰ If the school authorities abandoned control of the school-sponsored newspaper to the students, the actions of the student editors in this state-sponsored, classroom activity would still presumably be state action and *Tinker* would remain the standard for publication. See generally *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303.

Similarly, here the Hazelwood School District is involved in education and *Spectrum* is part of the district’s effort to carry out its educational mission. That “educational mission” makes this case fundamentally different from any “public forum” case the Court has considered since that phrase first appeared in a majority opinion in 1972. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972). *Mosley* and the subsequent public forum cases have involved claims of access to public property for the purpose of privately-initiated adult expression. The applicable constitutional metaphor has been the “free marketplace of ideas.”

The public secondary school classroom is not a competitive market of ideas wherein diverse thoughts compete for the allegiance of a discriminating audience. The secondary school classroom involves a highly selective presentation of ideas and expression as dictated by the course curriculum. The purpose is to convey information to and inculcate societal values in minors. The state as teacher must have the authority to select what information is conveyed and by whom.

Therefore, the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3164 (1986). The Court has acknowledged the “importance of public schools in the preparation of individuals for participation as citizens,” and as a means of “inculcating fundamental values necessary to the maintenance of a democratic political system.” *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). “[L]ocal school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and . . . ‘there is a

legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.' ” *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion).

Despite the substantial disagreement among members of the Court in *Pico* on the First Amendment limits to a school board's authority to regulate the content of a secondary school library, virtually all members of the Court explicitly recognized that the judgment of school officials is entitled to greatest deference in matters of curriculum.¹¹ Justice Blackmun observ-

¹¹ *Board of Education v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion of Brennan, J.) (emphasis in original):

[School officials] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values.

Id. at 889 (Burger, C. J., dissenting):

Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are “fundamental values” to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum.

Id. at 914 (Rehnquist, J., dissenting) (emphasis in original):

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

ed in his separate opinion in *Pico*, “the Court has recognized that students' First Amendment rights in most cases must give way if they interfere ‘with the schools' work or [with] the rights of other students to be secure and to be let alone,’ [Tinker, 393 U.S., at 508], and such interference will rise to intolerable levels if public participation in the management of the curriculum becomes commonplace.” *Id.* at 878 n. 1 (Blackmun, J., concurring in part and in the judgment). The district court in this case found, and the Eighth Circuit acknowledged, that *Spectrum* was an integral part of the school curriculum. App. A-9, A-54 to A-55. Not only was there the extensive teacher supervision, but the students received academic credit and grades for their participation in this class activity. This case illustrates graphically the fundamental incompatibility of a First Amendment right of access in the classroom and the traditional curricular control of local school boards and other school officials.

C. The Unique Quality of Curricular Expression

There is a special characteristic of “curricular expression” that also militates against the Eighth Circuit's public forum determination. It is related to the notion of selective access, but it is a distinct constitutional consideration. As the Court cautioned in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), “[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” First Amendment values are not “directly and sharply implicate[d]” in this case, for it does not involve voluntary, privately-initiated speech but rather “the compulsory environment of the classroom.” *Board of Education v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion).¹² The Journalism II

¹² In concluding that the school board's removal of certain books from a school library could constitute a First Amendment violation, the plurality emphasized the voluntary nature of the student's use of the library.

It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their

students were required to attend class and work on *Spectrum*. Roll was taken. (Tr. 2-35). Each student who did not hold an assigned editorial position was required to write a certain number of stories during the semester. The teacher assigned the topics, including those that generated this controversy.¹³ (Tr. 2-94). As has already been noted, the teacher was extensively involved in the development of *Spectrum*'s articles and, subject to the principal's review, made the ultimate decision on publication. The school, of course, financed the publication and provided necessary material support.

Speech compelled and to a large extent shaped by state actors in a classroom environment does not have the same status under the First Amendment as that which is the product of the

selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

Board of Education v. Pico, 457 U.S. 853, 869 (1982) (emphasis in original).

¹³ Judgments may vary among teachers and between a principal and teacher about the propriety of certain topics. That is illustrated by the instant case. The original Journalism II teacher thought the divorce and pregnancy articles were appropriate as written, although he recognized that his judgment was subject to the principal's review. (Tr. 2-44 to 2-45). His successor and the responsible teacher at the time Reynolds made his decision on the May 13 issue, Mr. Howard Emerson, did not think that they were appropriate. (Tr. 2-74, 2-168, 2-170, 2-171). Emerson had been the journalism teacher at Hazelwood Central, another of the Hazelwood School District's three high schools. (Tr. 2-75). As the educational leader, it is the principal's responsibility ultimately to decide what is appropriate within the context of the curriculum — in part, because opinions will differ from teacher to teacher.

speaker's own initiative and volition. Whatever the ultimate value underlying freedom of speech — be it self-government¹⁴ or self-actualization¹⁵ — it clearly elevates autonomous, uncoerced expression in the hierarchy of First Amendment values. "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . ." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 105 S.Ct. 2218, 2230 (1985) (emphasis in original), quoting *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968). As Justice Harlan observed for the Court in *Cohen v. California*, 403 U.S. 15, 24 (1971), "The constitutional right of free expression"

is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Equating a compulsory classroom exercise with the unfettered expression of which Justice Harlan wrote serves neither the cause of free expression nor that of secondary education. It confuses both the values of the First Amendment and the purpose of the educational exercise.

This is a very different case from *Widmar v. Vincent*, 454 U.S. 263 (1981), which also arose in an educational context. There the university meeting facilities were "generally open" to all registered student groups and the expression was wholly extracurricular. *Id.* at 267. The group seeking access was student-

¹⁴ A. Meiklejohn, *Free Speech and Its Relation to Self Government* (1948).

¹⁵ L. Tribe, *American Constitutional Law* 578 (1978).

led and student-initiated. See also *Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1338-39 (1986) (Powell, J., dissenting). Yet even in the university context — which is certainly closer to the “marketplace of ideas” paradigm than a high school — the Court did not “question the right of the University . . . ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’ ” 454 U.S. at 276, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). The court of appeals should have shown similar deference here. There may be many ways to teach journalism, and the laboratory exercise structured by the Hazelwood School District may not be the best one, but that is at root an educational, not constitutional, determination.

II. THE DECISION TO DELETE TWO PAGES OF SPECTRUM WAS REASONABLE AND VIEWPOINT NEUTRAL

The strong tradition of local control of curricular matters provides a compelling justification for vesting school authorities with broad discretion over the content of class-produced, school-sponsored publications. But the extent of school officials’ authority over *Spectrum* does not turn on whether that interest is “compelling” for purposes of the First Amendment. Since *Spectrum* is a nonpublic forum, “[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439, 3451 (1985).

The district court made extensive factual findings on the reasonableness of petitioners’ deletion of pages 4 and 5 of the May 13, 1983 issue of *Spectrum*. The court of appeals dismissed these justifications in large part because it erroneously concluded that *Spectrum* was a public forum, and that, therefore,

reasonableness was not the appropriate constitutional test. It held unconstitutional the deletion of two pages of *Spectrum* because petitioners had not proven that their removal was “ ‘necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.’ ” App. A-10, quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

The court of appeals erred in applying the *Tinker* standard. Whatever the relevance of *Tinker*, which was decided before the development of the public forum doctrine, it is clear that *Tinker* involved an instance of viewpoint discrimination and this case does not. Even if *Tinker* were the relevant constitutional standard, there would be no warrant for the court of appeals’ conclusion that school authorities may act to prevent “invasions of the rights of others” only when failure to do so would result in tort liability for the school.

A. Reasonableness

The district court concluded that in removing pages 4 and 5 of *Spectrum*, the petitioners acted to protect the privacy of the students and their families, to avoid the appearance of official endorsement of the sexual norms of the pregnant students, to prevent publication of materials that were inappropriate for high school age readers, and to insure fairness to the divorced parents whose actions were characterized. Judge Nangle’s reasoning demonstrates that in addition to the Hazelwood School District’s overarching interest in curricular control, the removal of pages 4 and 5 was also supported by other legitimate state interests implicated by the specific articles involved.

1. Privacy Concerns

The district court concluded that petitioners reasonably acted to protect the privacy of the pregnant students and their families. He cited evidence that there were 8 to 10 pregnant students at Hazelwood East in May of 1983 and that the profiles

contained identifying information from which a reader might be able to deduce the identities of the subjects. "Such a loss of anonymity could have resulted in unwarranted invasions of privacy," given the personal material in the profiles relating to the subjects' sex lives. App. A-55. Ms. Jane Huff, Chairman of the English Department at Hazelwood East, testified she could identify some of the girls from the descriptions. App. A-43.

For the court of appeals it was enough that these girls had consented to publication. The Eighth Circuit's position, however, ignores that school authorities act *in loco parentis*. These students were minors. There was evidence that some of the pregnant students at Hazelwood East were freshmen. (Tr. 1-87). "[I]mmature minors often lack the ability to make fully informed choices that take account of both immediate and long-term consequences. . . ." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (plurality opinion). "Part of the educational process is to learn in a protected environment where one's mistakes do not have damaging or irrevocable consequences." *Frasca v. Andrews*, 463 F.Supp. 1043, 1052 (E.D.N.Y. 1979). School authorities have a legitimate interest in ensuring that in a moment of naive candor a young student does not reveal to hundreds of her fellow students intimate aspects of her life that she later regrets disclosing. Adults, let alone children, are often disappointed that a serious, mature disclosure is often not received in the same spirit it is given. Certainly school officials have an interest — as individuals responsible for the student's welfare — in determining that the source of the student's unwanted embarrassment is not a class-produced, school-sponsored publication.

2. Official Endorsement of Sexual Norms

The district court also found that removal of pages 4 and 5 was a reasonable attempt to avoid any appearance that the school endorsed the sexual norms of the students profiled in the pregnancy article. App. A-55 to A-56. The court of appeals

dismissed this point with a strained and cryptic syllogism. It reasoned that since *Spectrum* was a public forum it "cannot be construed objectively as an integral part of the curriculum." App. A-12, quoting *Gambino v. Fairfax County School Board*, 429 F.Supp. 731, 736 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). The unstated conclusion presumably is that since *Spectrum* cannot be construed *objectively* as part of the curriculum, students could not *subjectively* believe that items appearing in *Spectrum* did so with school endorsement. Whatever other problems this logic may have, it is clearly based on a false premise for *Spectrum* was not a public forum.

Moreover, as a practical matter *Spectrum* was a school-sponsored newspaper produced by a class and that certainly created a reasonable risk that students — and others — would perceive items appearing in *Spectrum* as having some official endorsement. The Court has recognized the legitimacy of such concerns. In *Greer v. Spock*, 424 U.S. 828 (1976), the Court held that the commanding general of Fort Dix properly denied permission to political candidates to speak and distribute campaign literature on the military reservation. The Court found that the policy against partisan political activities on military installations was reasonably calculated to insulate the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." *Id.* at 839. The plurality in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), found similar justification for the city's ban of political advertisements from city transit buses. Because of the "blare of political propaganda" and "lurking doubts about favoritism" that accepting such advertisements might create, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising [did] not rise to the dignity of a First Amendment violation." *Id.* at 304. Most recently, in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439, 3453 (1985), the Court held that the Government could reasonably exclude legal defense and political advocacy organizations from the Combined Federal Campaign to avoid

any appearance of favoritism. Concerns about perceptions of official endorsement are even greater in this case because the audience consists of minors. *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981); see *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).¹⁶

3. Appropriateness

The district court also credited petitioners' judgments, as professional educators, "that portions of the articles in question were not appropriate for high school age readers or publication in a school sponsored newspaper" App. A-45. Indeed, he found their judgment "entitled to great deference." *Id.* The court of appeals disagreed with both the judgment and the deference that it was accorded.¹⁷

¹⁶ See also *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3166 (1986) ("it was perfectly appropriate for the school to disassociate itself [from student's speech] to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education").

¹⁷ On the pregnancy article, the court of appeals observed:

Nor is there evidence in this record to support the administrators' view that the article was inappropriate for publication in *Spectrum*, given the age and immaturity of some of its readers. Unfortunately teenage pregnancy is a problem in nearly every high school in the United States, including Hazelwood East. The students in the high school, including the freshmen and sophomores, are aware of the problem, and it is most unlikely that anything in the articles would offend their sensibilities.

App. A-13. As for the divorce article:

Underlying the deletion is the school district's feeling that these articles were inappropriate for high school students because: "divorce is per se an inappropriate subject for high school newspapers." Unfortunately, statistics reveal that a significant number of high school students have grown up in single parent homes due to divorce. Thus, a responsible treatment of this subject in the high school newspaper would not be shocking, or even new — it would be an outside and perhaps helpful, perspective on a well-known subject.

App. A-14 to A-15.

This Court has recently emphasized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986). In *Fraser* the Court held that a school district did not violate the First and Fourteenth Amendments when it disciplined a student for giving a lewd speech during a school-sponsored assembly.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.

Id. The Court noted that school authorities act *in loco parentis* and therefore must have substantial latitude in determining what expression is appropriate within the confines of the school. *Id.*

[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, [321 U.S. 158, 166 (1944)] The legislature could properly conclude that parents and others, *teachers for example*, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Ginsberg v. New York, 390 U.S. 629, 639 (1968) (emphasis added). In *Ginsberg* the Court upheld a statute prohibiting the sale to minors of sexually explicit material that constitutionally could not be banned as obscene if sold to adults. See also

Federal Communications Commission v. Pacific Foundation, 438 U.S. 726 (1978).

The deference to school authorities evidenced by *Fraser* is not limited to lewd speech. As Justice Blackmun observed in his separate concurrence in *Board of Education v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring in part and in judgment), "First Amendment principles would allow a school board to refuse to make a book available to students . . . because it is psychologically or intellectually inappropriate for the age group" Indeed the psychological impact, for good or ill, of an article appearing in a school-sponsored newspaper discussing teenage sexuality is likely to be much greater than *Fraser's* brief litany of double entendres. It is therefore even more important here that school officials have the authority to determine when and if the audience is ready. "[I]n the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place." Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex.L.Rev. 477, 486 (1981).

This recognized and inherent authority of school officials at the primary and secondary levels to delimit what is "appropriate" discourse within curricular and school-sponsored activities further supports the nonpublic forum status of *Spectrum*. In *Cornelius*, 105 S.Ct. at 3450, the CFC was a nonpublic forum as a result of the "Government's consistent policy . . . to limit participation in the CFC to 'appropriate' voluntary agencies" In this case not only was the "appropriateness" standard a limitation on access, but that limitation was uniquely justified by the inculcative role of the secondary school and the minority of *Spectrum's* audience.

4. Fairness

Principal Reynolds also objected to the use of Diana Herbert's name in the "Divorce's impact" story and her quotes

characterizing the reasons her parents divorced. The district court found no indication in the article — or at trial — that her parents, especially her father, had been given an opportunity to respond to or rebut her statements. App. A-42 to A-43, A-56. "Thus, there is serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." App. A-56. This concern was supported by expert testimony. App. A-45. The court of appeals dismissed this rationale on the grounds that, unknown to Principal Reynolds, the teacher, Howard Emerson, had already decided to delete Diana Herbert's name from the story. But as Judge Nangle noted, Reynolds' "conduct must be evaluated according to the facts known to him at the time he acted." A-56.

5. Deletion of All of Pages Four and Five

Likewise, the district court found that when Principal Reynolds received a telephone call from Howard Emerson on May 11, 1983 requesting Reynolds' review of the page proofs for the May 13 issue, Reynolds reasonably believed he had to make an immediate decision, that there was no time to make any changes in the content of the stories, and that no paper would be produced if the issue were delayed. A-40. The "decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius, supra*, at 3453 (emphasis in original). Nor is there any requirement that the State's restriction be "narrowly tailored." *Id.* In other situations involving nonpublic forums, the Court has deferred to the reasonable beliefs of administrators. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).¹⁸

¹⁸ The court of appeals criticized the decision to delete the two pages, stating that the "apparent reason" was "administrative convenience." App. A-12. The court states "there was no specific timetable for publication of that or any other issue" — an assertion

B. Viewpoint Discrimination And The Tinker Standard

The court of appeals rejected the above analysis and concluded that the appropriate standard was not the reasonableness test, but the "substantial disruption/invasion of the rights of others" standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker* one junior high school and two high school students wore black armbands to school with the knowledge and encouragement of their parents. The purpose of the black armbands was to protest American involvement in the Vietnam War. Briefly before, and in anticipation of, this protest, the principals of the Des Moines schools adopted a policy banning the wearing of armbands and providing that a student's failure to remove an armband would result in his suspension. All three students wore their armbands to school and were suspended.

The *Tinker* Court held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Id.* at 506. These rights must be balanced against "the need for affirming the comprehensive authority of the States and of school of-

belied by the page proofs themselves. They bear the date May 13, 1983. J.A. 4-5. The court concludes that "the principal could have delayed publication long enough to seek student concurrence to the changes he proposed." App. A-12. It also faults the school district for citing "no reason why it couldn't publish the deleted pages with only the allegedly objectionable articles excised." *Id.*

Even if administrative convenience is not a compelling state interest, it certainly is a reasonable one. But the implications in the court of appeals' characterization are unwarranted. The district court made detailed findings of fact and explicit evaluations of the credibility of the witnesses. The court of appeals did not find any of his conclusions "clearly erroneous." With the benefit of hindsight — and without the responsibility of making an immediate decision — a number of alternative courses of action are conceivable. The lateness in the school year complicated many of them. Deleting only the two articles also would have created problems. The excision would then have been obvious to the entire student body and would have virtually ensured widespread unofficial distribution of the deleted articles.

ficials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. The Court noted that the Des Moines "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance." *Id.* at 510.

[A] particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

Id. at 510-511. The *Tinker* Court then articulated the standard that since has been associated with that case: even where the student seeks to express an "unpopular viewpoint," *id.* at 509,

conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513.

The court of appeals in this case concluded "there is no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." App. A-12. It then focused on the invasion of privacy prong of the *Tinker* standard.

We are left then with the heart of this case: whether the principal justifiably censored the divorce story because it identified one freshman, and the pregnancy case study because it allegedly invaded the privacy of the fathers and the pregnant girls' parents.

App. A-13. The court of appeals concluded that when the *Tinker* Court spoke of "invasion of the rights of others" it meant that school officials could limit student speech "only when publication of that speech could result in tort liability for the school." App. A-14.

The court of appeals erred in two respects. First, *Tinker* has no applicability to this case. The armband restriction imposed by Des Moines School District officials "involved an unequivocal attempt to prevent students from expressing their viewpoint on a political issue." *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 49-50 n. 9 (1983); see *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3163 (1986). Viewpoint discrimination is always subject to the most stringent First Amendment scrutiny whether it occurs in a public or nonpublic forum. There has been no suggestion in this case — by the court of appeals or by respondents — that deletion of the two pages of *Spectrum* constituted any form of viewpoint discrimination. The district court found that not only did Reynolds not have any objection to any views expressed in the articles, but he had no objection to the general topics themselves.¹⁹ Judge Nangle noted that articles on teenage pregnancy had appeared in *Spectrum* in the past. App. A-28 to A-29. The difference here was the privacy concerns raised by

¹⁹ App. A-56 to A-57:

The facts that a large banner advertised the general topics to be covered in the May 13, 1983 issue and that Mr. Reynolds undoubtedly saw said banner several days prior to his conduct, merely demonstrates that Mr. Reynolds did not, as a matter of principle, oppose discussion of said topics in *Spectrum*. His objections legitimately went to the manner in which two (2) of the topics were handled. His objections were not pretextual....

...Several copies of the articles in question were circulated in xerox form at Hazelwood East subsequent to May 13, 1983.... Moreover, no efforts were made by defendants to stop said circulation or to punish the individuals responsible therefor. Thus, defendants did not attempt to quash discussion of the topics in question.

the student profiles. Reynolds' objection was to the form of the expression — the use of quotes and profiles of identifiable subjects — not the topics per se or any particular viewpoints on them.

The relevance of *Tinker* is also limited because the students in that case "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." 393 U.S. at 514. *Tinker* involved privately-initiated, extracurricular speech and did not purport to speak to the authority of school officials to regulate speech within the context of school-sponsored activities or matters of curriculum.

The second major difficulty with the court of appeals' application of *Tinker* is that there is nothing in that opinion that legally or logically supports the proposition that school officials may act to protect the privacy of students within their charge only when failure to do so would subject the school district to tort liability.²⁰ *Tinker* arose in a context of privately-initiated, nonschool-sponsored expression in which there was no issue of the school's liability. The case, presumably, means what it says: school officials may act to prevent "invasions of the rights of others." Surely school authorities have substantial latitude to protect their students — as opposed to merely protect themselves or the coffer of their school district. In *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986), the Court noted that Fraser's "speech could well be seriously damaging to its less mature audience...." It did not speculate whether any member of that audience had a cause of action against the school.

²⁰ There is substantial confusion and disagreement in the lower courts about the meaning of *Tinker*. Compare, e.g., *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972) with *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971). See generally Huffman & Trauth, *High School Students' Publication Rights and Prior Restraint*, 10 J. Law & Educ. 485 (1981). The Eighth Circuit is the first court to put the tort liability gloss on the *Tinker* standard.

A better interpretation of *Tinker's* reference to "invasion of the rights of others" was put forward in the Second Circuit's *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). The Second Circuit held that New York City public school officials did not violate the rights of the student staff of a high school newspaper by prohibiting distribution of a sex questionnaire to high school students. The school officials contended that the survey, which was to be both anonymous and voluntary, would "solicit a response that will invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm." *Id.* at 516. The court of appeals held that the school officials had demonstrated a "rational basis" for their conclusion that distribution of the questionnaire would result in significant harm to some students. The Second Circuit never discussed any potential liability on the part of the school. See also *Frasca v. Andrews*, 463 F.Supp. 1043 (E.D.N.Y. 1979).

The tort liability standard crafted by the Eighth Circuit places teachers and school administrators in the difficult position of having to make highly technical and potentially costly legal judgments about tort liability and the limits of First Amendment protection.²¹ As Judge Wollman observed in his dissent to the court of appeals' opinion:

²¹ The difficulty of the legal determination is illustrated by the court of appeals' opinion. The court assumes, without analysis, that the minor's consent to publication of personal information in a school-sponsored newspaper insulates the school district from any tort liability to that student. That is a questionable legal proposition. Although consent is normally an absolute defense to an invasion of privacy tort, this case concerns the legal effect of a *minor's* consent. A minor normally cannot give effective consent to a violation of her rights. See generally Restatement (Second) of Torts §892A, at 365; cf. Mo.Rev.Stat. §431.055 (person competent to enter contract in Missouri at 18 years of age); *id.* §431.061(1) (to consent to medical treatment individual must be at least 18 years of age). The situation is even more complicated because the court assumes that the student's consent to another student is sufficient to release the school board.

The majority opinion consigns school officials to chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material. Although the commercial press can well afford to retain counsel to advise them daily on questions of possible liability, not many school districts possess similar resources.

App. A-20. In a period of budgetary constraint, high legal fees, and unaffordable — indeed often unavailable — insurance, a school district may well forego the sponsorship of student publications rather than risk additional financial and legal exposure they cannot otherwise control.

The irony of the Eighth Circuit's opinion is that it ultimately does more harm than good for the cause of student journalism. By declaring the school-sponsored newspaper produced by a journalism class a "public forum," the court effectively removes the teacher from the classroom — denying the students the guidance and discipline that makes for a superior learning experience. By constitutionally barring school officials from preventing "invasion of the rights of others" by school-sponsored publications unless the school district's liability is apparent, the court invites elimination of the very avenues for expression it sought to enhance. And the fundamental question is lost: What is the most effective way to teach journalism? Different school districts now undoubtedly answer that question in different ways. If the Eighth Circuit's analysis is correct, the courts will dictate how journalism is taught in the future.

As we have demonstrated, however, the court of appeals' analysis is not correct. The theory and practice of a curricular newspaper is wholly incompatible with the concept of a public forum. As a nonpublic forum, there remains the latitude for reasonable regulation of the content of the publication. The First Amendment strictures against viewpoint discrimination

and attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), still police the line between the educational mission and impermissible indoctrination. That line was not transgressed here. The removal of articles from the May 13, 1983 issue of *Spectrum* was reasonably related to the State's legitimate interests as educator.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, reversing the judgment of the district court and remanding for an award of damages to respondents, should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

Supreme Court, U.S.

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No. 86-836

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al*,
Petitioners,

VS.

CATHY KUHLMEIER, *et al*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF OF RESPONDENTS

Respondents respectfully pray that this court affirm the judgment of the United States Court of Appeals for the Eighth Circuit entered July 7, 1986.

STATEMENT OF THE CASE

Petitioners cite the District Court opinion as authority for most of their statement of facts. The Eighth Circuit opinion rejected seven of the District Court's findings and quoted directly from trial testimony on the key issue of whether *Spectrum* was a "student publication" 795 F.2d 1368, 1371-2 (8th Cir. 1986).

Contrary to the District Court's opinion (App. A-29) as quoted by Petitioners (Pet. Br. 5), the advisor was not the final authority over content. There was no testimony that he initiated any story

ideas, no testimony that he wrote any portion of any article, no testimony that he told any reporter what to write, or deleted any student writing.

During the first semester, the Journalism I students who were going to take Journalism II during the spring semester listed possible story ideas for articles they wanted published when they were on the *Spectrum* staff (Tr. 2-15).

The advisor selected the editor-in-chief and the assistant editor (Tr. 2-17), and the three of them (the advisor and two students) selected the other six (copy, news, feature, sports, layout and photo) by a "collective process" (Tr. 2-17). The editor-in-chief and assistant editor made the decisions on what articles would be included in the paper, according to the advisor's testimony (Tr. 2-17).

The student editors scheduled the publication dates, the number of pages and the number of issues according to the advisor (Tr. 2-26, 2-63, 2-64). The editor-in-chief would check an article ready for publication to see if it had sufficient facts and research (Tr. 2-34).

Cathy Kuhlmeier testified that as the layout editor, she wrote no stories, and her work for the paper consisted of selecting which stories would be included (along with her three staff members), what parts of the articles would fit into the available space, and positioning them into the page size (Tr. 1-26, 1-33, 1-35). She also indicated that the copy editors changed article content (1-31) and the editor-in-chief and assistant editor told the staff members what an article should cover (Tr. 1-29). There was no testimony that the advisor decided, changed or controlled content in any way.

Mary Williams, the author of the story on runaways, testified that the news editor assigned her topics (Tr. 1-105) and copy

editors were the only ones who changed her content (Tr. 1-114).

The other major disagreement with Petitioners statement of facts concerned the inclusion of Diana Herbert's name in the divorce story. Although some trial testimony was that the District Information Officer removed her name from the page proof (Tr. 2-170) and other testimony established that the student editors had corrected that during copy editing of the page proof (Tr. 1-100), there was no question that Diana Herbert's name was edited out and replaced with her class year as the identifying information. Additionally, plaintiff's trial Exhibit 12 contained the reddish-orange copy editing marks through Diana Herbert's name made during the page proof corrections. (Tr. 1-100).

There was also testimony concerning parental consent. Cathy Kuhlmeier testified that when Shari Gordon interviewed her for the divorce story and checked the accuracy of Cathy's quotes with her, Shari asked Cathy to obtain her mom's consent, Cathy did so, and relayed the consent to Shari when Shari checked the accuracy of her quotes (Tr. 1-57, 1-58). Mary Williams also testified that those interviewed for the divorce story had received parental consent to be interviewed (Tr. 1-122).

Finally, several briefs and the Eighth Circuit opinion contained a reference to a mimeograph of the challenged articles which was distributed at Hazelwood. This is entirely untrue, as no such distribution occurred, and there was no reference to any such occurrence during the trial. The school year ended approximately one week after this issue was published.

SUMMARY OF ARGUMENT

The Hazelwood East High School student newspaper, *Spectrum*, served as a true conduit for student expression, and as such was operated as a limited public forum. It was not a mere mobile bulletin board whose content was subject to the principal's control. Student editors and staff members designed its content around current social topics of relevance to all high school students, including county, state and national issues. The Curriculum Guide adopted by the school board encouraged and suggested that the journalism education program adopt professional journalism standards including the development of articles on relevant social issues. Under this established pattern, students had access to the newspaper and its ideas.

In addition to the limited public forum characteristics, *Spectrum* was a newspaper in the truest sense of the word. Therefore, its student editors were entitled to First Amendment protection of their "editorial judgment."

With the application of the First Amendment to *Spectrum*, there may still be some compelling state interests, inherent in its presence in a public school, which provide a sufficient basis to allow the principal to censor student content. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) contains precedent for accepting four compelling interests as sufficient to outweigh the First Amendment protection: substantial disruption of school, libel, obscenity and invasion of the rights of others.

Only two are applicable here, libel and invasion of privacy. Petitioners do not argue libel in their Brief to this Court. The school district suggests two others: "inappropriate" content

and fairness. Libel and invasion of privacy are not factually present under the evidence adduced at trial. "Inappropriate" content and the school's interest in fairness are not of sufficient compelling societal value to invalidate democracy's need for free discussion of information critical to many teenager's lives. These interests do not justify teaching our future citizens that the government, in the guise of the principal, can suppress critical discussion of government policies, such as school board decisions, because the principal did not like the content of the student expression.

Finally, if this Court finds the basis for any compelling state interest, then the importance of the First Amendment's freedom of the press requires prior written regulations setting out what can be censored, by whom, for what reasons, and with an appeal to an objective reviewer. No such regulations existed at Hazelwood, and therefore, the principal's actions in deleting the two pages violated the First Amendment to the United States Constitution.

ARGUMENT

For 200 years the guarantee of individual free speech and a free press protected democracy in a way unique in the history of governments. With our Bill of Rights, the founders of a new state limited for the first time the powers of that government in the name of the people. At first all rights did not fully extend to all sections of the population, with white, male land-owners as the only full citizens. Part of our country's proud history is the gradual expansion of the meaning of citizen and the extension of the Constitution to people of all colors and to women. As society grew and expanded, so did the flexibility of the Constitution. As communication systems grew more sophisticated, so did the special Constitutional emphasis paid to the crucial role of the press expressing the opinions of the people, free from governmental interference.

In this case, the First Amendment rights stemming from a student-run newspaper were curtailed when the government, in the form of the principal, intervened and prevented the students from disseminating their ideas among the school community.

In an initial analysis, a high school newspaper article is a written expression which falls within "the press" protected by the First Amendment. This principle is recognized as vital to our country because the "exchange of ideas and the propagation of views," is essential to the process of democracy. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* 473 U.S. ___, 87 L. Ed. 2d 567, 577 (1985).

These goals, basic to an informed citizenry, are promoted by strict interpretation of the First Amendment protections of free speech. The unique ability of the written word to promote critical discussion of societal values around which we organize government was further recognized by the drafters of our Constitution who gave a special place to "the press." *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) directly applied the First Amendment to high schools. In the

same year Justice Blackmun wrote in *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1085 (1969) cert. den. 398 U.S. 965 (1970):

Those rights follow one through the classroom door. ... And what better or more ideal place is there for free discussion and for the exchange of ideas than academic halls?

There is a difference in the instant case because a newspaper is involved. Not just a broadsheet that serves as a mobile bulletin board of student club meetings, *Spectrum* was a true "publication containing news and opinion of current events, feature articles, ..." (American Heritage Dictionary, 1973).

This case presents a novel confrontation between the traditional right of a newspaper to be free of pre-publication censorship and the "special environment" of the public high school.

Although the *Tinker* court did not limit a newspaper, the analysis of that Court, coupled with more recent decisions on public access to a forum for expression provide this Court with a framework for evaluating the competing interests raised herein.

Tinker is precedent for limits on the First Amendment in light of the "special characteristics of the school environment." There have traditionally been more restrictions on non-newspaper expression, and by drawing from the body of law governing students outside of school, the *Tinker* court found precedents for several restrictions on student expression.

The *Tinker* court offered four justifications for limiting student expression:

1. Substantial disruption of school.
2. Obscenity.
3. Libel.
4. Invasion of the rights of others.

The first two recognize the student's interest in learning. It cannot be done without holding class, and obscenity in most forms has no educational value. Although not confronted with facts of the last two above-listed justifications, the *Tinker* court found that the school's interest in protecting its students from harm was important enough to justify pre-publication censorship of libel in high schools. However, since *Tinker* did not address a high school newspaper, its application to the instant case needs to be tempered by recognition of the unique forum a newspaper represents.

Several cases since 1969 have looked to the type of forum used for expression. Although not directly addressing a newspaper, this Court has provided greater First Amendment protection where the forum for the expression allowed public access. This analysis is also relevant for a threshold Supreme Court opinion on student newspapers since recent lower courts confronted with high school newspapers used public forum analysis. See Table 1.

I. SPECTRUM IS A LIMITED PUBLIC FORUM

The initial question under the analysis recently specified in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, *supra*, at 578, is the nature of the forum which provides expressive activity.

Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest....^{***} Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a

compelling governmental interest.

There may be some question as to whether the "forum" is the high school or the newspaper itself. Under either inquiry, the result is the same. The access granted by the school to its buildings is similar to the access granted to the newspaper—students who are enrolled in the school, along with their parents, guests and the community at large when invited or having business at the school. Where limited access is sought, this Court has "taken a more tailored approach to ascertaining the perimeters of a forum", and it may be more appropriate to examine the access to the newspaper. *Cornelius*, *supra*, at 579.

Spectrum was created by the school district as a limited public forum for the use of certain speakers. Students enrolled in journalism class wrote the articles, students who read the paper wrote letters to the editor, and all students, staff or employees of the school district received the information contained in *Spectrum*. The *Cornelius* court looked to: policy and practice of the government to ascertain whether it intended to designate a public forum, the nature of the property, and the property's compatibility with expressive activity.

A. Policy Intent of School

The evidence in this case established school intent that *Spectrum* act as a forum for public expressive activity for certain speakers, as shown by the Curriculum Guide, the required textbook, the course content, the School Board policies governing publications and approval of the journalism course by the principal in his evaluation of the teacher-advisor.

Curriculum Guide

The Hazelwood School Board developed a large and extensive Curriculum Guide for all levels in the District. The

3-page section covering Journalism I listed as course objectives:

2. verbal, written, personal, and social skills needed to publish a school newspaper....
4. ... dealing with 'sensitive issues' within the school community
7. the development of responsibility for what one writes...

The section listing writing skills to be acquired by the students included "write news stories, features, and editorials." The section on Values included "The student may be able to value...4. the ability to express oneself intelligently on personal, social, and political issues by using the journalistic skills of research and critical thinking." A required unit was "Writing to State an Opinion" which listed objectives as:

- (6) assess the importance of a letter to the editor column for reader interest, feedback, and balance to the newspaper's staff.
- (7) identify and discern the problems of handling 'sensitive subjects' in the school environment and assess proper and improper procedures in reporting on such subjects.
- (10) identify the legal restrictions placed on the journalist such as copyright, libel, obscenity laws, school policies.

Numerous times throughout one of the teaching aids (*Student Press Rights*, by Robert Trager), the suggestion is made to read other school newspapers for ideas. (Pl.Ex. 21, Tr. 2-3). That was where the students found some of the ideas for the articles in question.

The eight page portion of the District's Curriculum Guide which covered Journalism II showed repeatedly the goal to provide public access to ideas in *Spectrum*. It listed among its "Concepts":

1. An experience for students to practice journalistic

techniques learned in Journalism I by publishing the school newspaper...

2. the legal, moral and ethical restrictions imposed upon journalists within the school community.
4. leadership responsibilities as issue and page editors.

The "Writing Skills" included, to "learn, through reader feedback, the interests of the reading audience" and "research a subject 'in-depth' to write a documented analysis of a school problem or issue." The articles deleted exemplified these course goals.

The materials required, included as supplies, an alphabetical list of students in school, a list of staff and hour by hour location, and a list of administrators, titles, location and duties. Two sections of the "Suggested Activities" (for the advisor) said establish a budget and it is preferable to work on the weekend when finishing the sports page. (Pl.Ex. 28, Tr. 2-3). Again, the stated policy was to present current, up-to-date news in a professional manner.

The content of the articles deleted, the manner in which the students wrote them, and the newspaper vehicle for their publication follow the Curriculum Guide. Not only did the students follow the education they were receiving in publishing these stories, but the school's curriculum requirements governing publication of the paper emphasized the "dissemination of views and ideas" which delineates a public forum. *Cornelius, supra*.

Required Textbook

The required textbook for Journalism I and Journalism II was chosen by the School Board. Out of 26 chapters in that text, the Journalism teacher covered 9 in total and parts of 5 others. One covered chapter, "Understanding Press Law", was written by Dale Spencer, an attorney and professor at the Univer-

sity of Missouri School of Journalism. The topics covered included "What is Libel", "The Right of Privacy" and "Obscenity". One of the class exercises from that unit was to describe the role of the "advisor" as a "prior restraint representative" of the administration. Another exercise was to discuss the rights of students to print an editorial urging students not to take home the "propaganda" issued by school officials concerning items like registration and school events.

The chapter on "Handling Sensitive Issues", also covered in Journalism I, centered around an exercise in writing an article on excessive drinking. This chapter also discussed covering a "nonschool event justified on the basis of students' compelling interest in world affairs".

This chapter was deemed so important by the instructor that he reprinted a section, "Criteria for Publication of Sensitive Issues", and posted it throughout the second semester for all journalism classes. (Tr. 2-10). The last criteria on this list encourages a student journalist to decide whether publication will be merely a "private situation" or will be for the common good. (Pl.Ex. 17, Tr. 2-136) The articles as designed, written and attempted to be published by these students followed the principles taught in these two chapters.

The teacher's lectures and content had covered these areas for 5 full semesters before this incident. His professional evaluation, written by the principal, stated he was responsible for the "growth of the program". It noted that the time he spent is "extraordinary" and that because of his active support for journalism, many students are going into journalism as a career choice, or majoring in journalism in college. The evaluation also noted the "excellent publications" have won "many prizes." (Pl.Ex. 119, Tr. 2-136).

The School Board itself endorsed opening *Spectrum* to general student expression.

Board policy 348.51, entitled "School sponsored publications" stated:

Students who are not in the publications classes may submit material for consideration according to the following conditions:

- a. All material must be signed.
- b. The material will be evaluated by an editorial review board of students from the publications classes.
- c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final. Pl.Ex. 26, Tr. 2-3)

Although no such review board existed, this board policy indicates this newspaper was available to non-journalism students to "advance the speaker's interest in informing readers..." a characteristic of a public forum. See *Cornelius, supra*.

School Board policy also encouraged the discussion and expression of "controversial issues". Policy 341.5 states:

As free objective discussion of controversial issues is the heart of the process of representative government, freedom of speech and free access to information are among our most cherished traditions.

It is the responsibility of the teacher to see that the controversial issues discussed in the classroom are relevant to the course of study, limited to the level of understanding and age group of the student, and maintained within the bounds of objectivity commonly acceptable to the community. ...

Specifically, the student shall have:...

- b. The right to have access to all relevant information, including the materials which circulate freely in the community....

- d. The right to form and express one's own opinions on the controversial issues without, thereby jeopardizing the relationship with the teacher or with the school.

...The teacher must approach such discussions in the classroom in an impartial and unprejudiced manner and must refrain from using the classroom privilege to promote a partisan and fractional point of view."

(Pl.Ex. 25. Tr.2-3)

B. Nature of Property

The high school setting is designed to provide free, quality education to those of a certain age or past educational achievement within a certain geographical area who abide by school regulations.

School officials need broad discretion in maintaining order and discipline or they cannot achieve their educational goals.

At the same time they do not function in a vacuum for the public high school is a microcosm of society, containing all issues which exist in the home or on the street.

So long as a school can hold classes, there is nothing inherent in the public high school setting which conflicts with learning about freedom of the press. Schools are not in a category with prisons¹ or military reservations.² In fact, this high school set itself up as a place for learning about the First Amendment.

The journalism students were taught in Journalism I class that what to write is as important as how to write. Part of

¹See *Adderley v. Florida*, 385 U.S. 39, (1966).

²See *Greer v. Spock*, 424 U.S. 828, (1976).

the learning process which the schools undertake in offering a journalism curriculum is for the student to generate ideas for news and feature articles. This is in contrast to the history class or English class where the instructor provides the theme or content of the writing assignment, and the student chooses the manner in which to write. The history or English teacher will grade the student on how well the content follows or delineates the assigned theme.

In journalism, finding the theme is crucial to the student's inculcation of journalistic skills, a valid educational goal. If the student cannot learn what is news, he cannot become a journalist, a process initiated in high school journalism education.

That [our schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

By undertaking a journalism program with 2 or 3 classes each semester, Hazelwood is educating the young for journalism—as reporters and as readers. The school is a partner with the students in this learning process. In Hazelwood East journalism the partnership includes a newspaper.

That partnership also includes the reader. A letter to the editor on runaways motivated the student who wrote one of the articles here. Without the newspaper serving as a forum for the exchange of student ideas the journalism teacher could not have instilled in the author of the article on runaways the sense that journalists look to the concerns of the community to determine news and feature topics.

Characterizing *Spectrum* as a limited public forum is consistent with high school educational purpose.

C. Compatibility with Expression

Not only is Hazelwood's declared journalism program consistent with recognizing this student newspaper as a limited public forum, but *Spectrum*, as it was operated by Hazelwood School District was designed for broad, public expressive activity.

The paper printed letters to the editor from non-journalism students. The paper printed articles about the community outside the high school, and about issues of national importance.

The school entered this newspaper in statewide competitions for review and criticism by acclaimed journalism educators specializing in measuring high school publications against professional standards. In the school-year preceding the one at issue, nine Hazelwood East journalism students received awards for news and feature articles, and the paper itself won First Honors from the Missouri Interscholastic Press Association, with the fourth highest points of all Missouri high schools. (Pl.Ex. 20, Tr. 2-3).

Each fall semester a "Statement of Policy" was printed which stated the student editorial control, affirmed the application of the First Amendment to *Spectrum*, and contained a disclaimer that the contents did not represent views of school officials. (Joint Appendix 26,27).

Opinions were printed as editorials, as letters to the editor and in the Opinion Column where staff members selected a topic and summarized the opinions of non-staff members (Tr. 2-18).

The paper was available to the public through sales at the library and the School District's Administrative Office. The impact of *Spectrum* was felt far beyond the Journalism II classroom.

The paper had served in previous issues and previous years as a forum for discussion of teenage dating, students' use of drugs and alcohol, race relations, the death penalty, desegregation, religious cults, the draft, school busing, students' Fourth Amendment rights. (Pl.Exs. 43-98; Tr. 2-3).

The policy intent of the school officials, the nature of school property and *Spectrum's* compatibility with student expression all indicate that this school newspaper is a limited public forum for discussion of relevant ideas by students, teachers and staff.

As a limited public forum, *Spectrum* provided the type of access to ideas which is at the core of the First Amendment.

There is a further line of cases which apply here since they specifically address freedom of the press, and *Spectrum* had the characteristics of a privately-owned newspaper.

Private newspapers have been staunchly protected by American Courts from nearly all government intervention. Societal disgust at the publication of obscenity or libel is enforced after the material has been printed. Pre-publication review is not part of American press tradition, and government prior restraint is not tolerated.

One of the main reasons for the tight control over governmental action was mentioned in *Mills v. Alabama*, 384 U.S. 214, 218 (1966);

[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.

Elementary logic suggests that protecting the right to discuss government policy has no teeth if the government itself is granted control over content. All of the reasons for protecting a private press applies to a high school press. Democracy needs to have its high school youth, some of voting age, discussing school operations, and school officials are just as prone as any governing body to try to suppress criticism.

The principal began requiring a copy of the page proofs five months before this deletion due to student criticism of school board policy. (Tr. 2-12).

This Court has taken great pains to protect the discretion and power of the "editor" of a paper. In *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) it stated:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Spectrum has several student editors with various decision making powers. The idea for the content of every article came solely from the students. The advisor did not create the content of any article. From the student ideas, articles were assigned jointly by the editor-in-chief and the advisor. The uncontradicted evidence at trial was that a student could write any article he wanted, and could refuse any story idea assigned. Student layout editors, such as Cathy Kuhlmeier, chose which stories would appear where in the paper. He wrote no articles and made no direct decisions on content. He reviewed all stages of the production in order to grade the students. The principal neither suggested ideas, wrote articles or became involved in the content, until this incident. *Spectrum* content was under the control and judgment of the student editors.

The school district is asking this Court to ordain the principal as editor with absolute, unappealable control over content, contrary to the pattern of newspaper production established by the Curriculum Guide and school board policies. The

present situation squarely confronts the right of a citizen as an editor to be free from censorship by the government.

We see that beginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. ... A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Miami Herald v. Tornillo, supra, at 256.

This case presents a unique situation requiring this Court's highest sensitivity to potential chills upon the exercise of freedom of the press which arise from considering the state as editor.

A state can totally fund a newspaper, hire a government employee as editor, and promote specific government ideas therein, such as occurs with "Stars and Stripes" where the content focuses on activity in the Armed Forces. *Spectrum* was not created as the mouthpiece of school officials. It was established for the express purpose of printing student ideas.

When the government has control over content of a newspaper purportedly publishing student expression, the harm flows from allowing the state to produce the illusion of citizen free speech (only so long as it agrees with the state policy). That unwittingly allows the government to stifle criticism, precisely what the First Amendment was designed to prohibit.

School officials can complete their educational goal without violating the First Amendment. They can maintain discipline

and allocate resources without controlling content.³ It is not as repugnant to the First Amendment for the school district to limit the number of issues, set the size of each paper or even eliminate a school funded paper, even though such decisions indirectly influence the amount of space for student expression. That type of school control does not instill in future citizens that the government can censor if it disagrees with the citizen's idea. To condone the principal's actions encourages deletion by the government of discussion of the government.

II. NO COMPELLING STATE INTEREST SHOWN

Tinker analysis combined with the limited public forum characteristics of *Spectrum* and its recognition as a newspaper with student editorial control establishes that the First Amendment applies in this case.

Spectrum may still be subject to censorship if the school district demonstrates that a compelling state interest is more important to society than the First Amendment.

The basic justification for any censorship in this country is to avoid the harm that results from publication, primarily from inaccuracies.

The prior restraint must be aimed at redress of private wrongs, not merely articles described as "scandalous" or "causing controversy". *Near v. Minnesota*, 282 U.S. 697 (1931).

Censorship has also been allowed when the harm rises to the level of a societal interest, as with troop movements in time of war. This societal interest is similar to the *Tinker* court's

³Of course, barring obscenity requires making a content-based decision, but that situation is not present here.

assertion that schools can restrict expression which disrupts school. When a compelling interest exists, the school must demonstrate that the regulated speech has a unique impact on the classroom that interferes with the relevant compelling interest. Thus the articulated compelling interest must serve as the actual basis for the censorship. It should have substantial significance independent of the regulation of ideas and provide a societal benefit which outweighs the censorship.⁴

In areas outside a high school newspaper, this Court has balanced Constitutional rights against educational goals and rejected suggestions of "national unity",⁵ "civic development",⁶ stopping the influx of illegal aliens,⁷ and preservation of state's limited resources for education.⁸

Since Hazelwood District has not suggested that any of the articles were obscene or disrupted school the only compelling interests from *Tinker* are libel and invasion of the rights of others. The school district has also offered "inappropriateness" and local control over curriculum.

A. Articles Not Libelous

While making the bare allegation that the articles were libelous at trial, the school district no longer urges this interest in their Brief before this Court.

⁴See Farber, Daniel A. and Nowak, John E., *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984).

⁵See *West Virginia State Board of Education v. Barnette*, supra.

⁶See *Meyer v. Nebraska*, 262 U.S. 390 (1922).

⁷See *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972).

⁸See *Plyler v. Doe*, 457 U.S. 202 (1981).

In evaluating the articles content, there was no libel under Missouri law. The articles on their face do not accuse anyone of committing a crime, lacking sexual morality, or having a loathesome disease.⁹ They do not impute fraud, want of integrity, or misconduct in one's calling; the content was not false and the authors were not negligent or malicious.¹⁰ The student author obtained consent from both the students and their parents (Tr. 1-122) for the divorce story, including the use of the student's name. However, the *Spectrum* editors replaced the names with the student's class year. The specific quotes used were approved by the student interviewed (and her parents), who initialled them in the reporter's notebook (Tr. 1-110.)

Accuracy was further insured by the advisor reviewing those initials. The articles used opinions discussing matters of legitimate public interest.

The principal and other school officials took no action to verify whether the reporter had been accurate. The principal took no steps to delete the specific sentence he thought was libelous. His main concern was that the student interviewed should not have said such things about her father. The principal did not want the family's traumatic experience of divorce and upheaval to be discussed in the school newspaper. He wanted to limit the topics which the paper would cover.

The *Tinker* opinion has already modified the First Amendment's application to high schools when libel is alleged. In the private press, libel is not a basis for prior restraint; it

⁹Missouri Tort Law, Libel and Slander, Sec. 14.3 (1978).

¹⁰*Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969). See *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963) (subjecting one to ridicule insufficient to establish libel). *Anton v. St. Louis Suburban Newspapers, Inc.* 598 S.W.2d 493 (Mo. App. 1980). *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). *New York Times v. Sullivan*, 376 U.S. 254 (1964).

subjects the speaker to sanctions after publication. *Tinker* has lifted libel to the prominence of justifying prior restraint, even—though this emphasis is not directly related to providing an education.

B. Articles Not Invade Rights of Others

The only right alleged by the School District to have been violated was the right of privacy of pregnant students and their families by the teen revealing intimate aspects of her life (Pet.Br. 34).

As a threshold issue, the School District did not plead that the publication of the stories would have contravened any federal or state common law privacy rights. Pursuant to Fed. R. Civ. P. 12, they have waived any such defense.¹¹ The school district argues that the identities of the women interviewed for the teen pregnancy story could be ascertained and some harm to their privacy would result. The trial evidence established that the superintendent, the assistant superintendent, the principal, the District Information Officer and all students who testified at trial were not able to ascertain the identity of any student interviewed based on information in the article.

This "interest" suggested by the school district does not exist under the trial evidence. Since two of the three women interviewed had already given birth, and the other was five months pregnant at the time of the interview, there were no hidden intimate details to "reveal" since pregnancy is ordinarily under public observation in the classroom. Under Missouri law, there was accordingly no expectation of privacy. *Corcoran v. Southwestern Bell Telephone Co.*, 572 S.W.2d 212 (Mo. App. 1978).

¹¹Moore and Lucas, 2A Moore's Federal Practice, ¶ 12.23 (2d ed. 1986).

Missouri law further establishes that consent to the use of the quote in the newspaper is a complete defense *Munden v. Harris*, 134 S.W. 1076 (1911). Restatement (Second) of Torts states that consent is a defense to an "interest of personality" (Sec. 49) such as invasion of privacy.

In applying the consent, the Comment to Section 583 states:

It is not necessary that the other know that the matter to the publication of which he consents is defamatory in character. It is enough that he know the exact language of the publication...

Section 59 addresses minority consent:

(1) If a person whose interest is invaded is at the time by reason of his youth...incapable of understanding or appreciating the consequences of the invasion, the assent of such a person to the invasion is not effective as a consent thereto.

(2) The assent of a parent...has the same effect as though given by the person whose interest is invaded, if such parent...has the power to consent to the invasion.

The comment following that section says that if the child is capable of appreciating the "nature, extent and consequences of the invasion" there can be no liability even if the parent expressly refuses to consent.

Coupled with Missouri law, these sections clearly support the student reporter's choice of article content. The editor's and advisor's approval of the use of the quotes is also fully protected by the First Amendment since no invasion of privacy occurred.

The school district and the District Court want this Court to accept that the principal's unfounded, inaccurate and unconfirmed assessment as to the invasion of privacy is so important

that it justifies denial of a Constitutional protection. The school district has suggested no educational purpose served by accepting the principal's opinion on the school's exposure to liability based only on his personal knowledge. The District Court ignored the fact that the school district may have the right to protect itself from liability, but there is no right to be free from the threat of a lawsuit. Just as a school assumes more risk in sponsoring a football team, so does it undertake additional risks by offering a quality journalism program.

The teen pregnancy articles were also protected as publication of information of legitimate public interest.¹² The Restatement (Second) of Torts, Sec. 652A (1977) uses the pregnancy of a 12 year old to illustrate such public interest.

Thus, the principal's concerns about privacy are legally groundless, a position which he could have realized by either verifying the consent through the *Spectrum* reporter or establishing the presence of the requisite elements through consultation with an attorney. Written regulations governing censorship would have been helpful by putting the reporter on notice as to what to quote in a story, and would have provided the principal with guidance in considering any censorship decisions. Here, however, the school officials acted precisely out of the "undifferentiated fear or apprehension" which *Tinker* prohibits.

This Court rejected "invasion of privacy" as justification for prior restraint outside the high school setting in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The school district has put forth no educational goal which differentiates the present setting.

The principal wanted no public mention that Hazelwood had pregnant students and he acted to eliminate the issue from discussion in the school newspaper.

¹²See *Langworthy v. Pulitzer Publishing Co.*, *supra*.

For example, he acknowledged at trial there were 8 to 20 pregnant women attending school (Tr. 3-11), yet the school district position in every brief filed since trial says 8 to 10 pregnant women attended school. There is more to the issue than those women who attend school while pregnant, including those who dropped out of school because of the pregnancy, and those who did not carry it to term. Teen pregnancies threaten the health of these students, as they are considered to be "high-risk pregnancies." One valid educational purpose is the protection of the health and welfare of the school's students. This issue, with its many sides, is an example of the kind of "public interest" article which is relevant to high school students, wins journalism awards and is consistent with the school's educational mission.

Justice White addressed the "collision between claims of privacy and those of free press" in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975):

... it is appropriate to focus on ... whether the State may impose sanctions on the accurate publication of ... records ... which themselves are open to public inspection.

Justice White went on to say that the State could not impose sanctions on the accurate publication of the name of a rape victim obtained from public records. When a teen continues in school while five months or more pregnant, she has made her sexual activity public, and being interviewed in the school paper does not invade her privacy yet it provides other students with important information.

Requiring the school to establish an invasion of privacy as it is defined in tort, as the 8th Circuit suggested, has the advantage of allowing the principal to refer to previously defined

legal standards, thereby reducing arbitrariness and providing the community with notice of what is prohibited. Requiring actions rising to tort liability is one of the least restrictive ways that education interferes with First Amendment rights while allowing the school to protect itself from liability for students' actions.

One further observation illustrates that the spectre of violating a young woman's privacy was a smoke screen for this principal. After the deletion in May, 1983, throughout discussions with plaintiffs until suit was filed in late fall, 1983, the school board has not applied for any protective order against the publication of Diana Herbert's name or the pregnancy interviews.

C. "Inappropriate" Justification

The school principal testified to a further justification, not recognized by *Tinker*, that the content of some of the stories was "inappropriate" for high school students. The principal did not initiate the deletion, since he had not seen the page proofs. The District's Information Officer, now serving as temporary advisor, asked the principal to read the articles because he did not think the content "would fly" (Tr. 2-160). In specific, he testified that the interviews with the teen mothers were not "sensitive" to the high school students. "At that point I had a freshman in my own home and I wouldn't have wanted him to read those articles as a freshman in his high school newspaper." (Tr. 2-171)

The school district also urges the school's interest in "fairness" to justify Constitutional infringement. The sum and substance of the principal's testimony coupled with what the

school district advanced in its legal briefs is that if the principal feels that the content is not appropriate, then the story does not meet journalistic standards. There are two essential problems with allowing the principal to decide what constitutes "fairness". First, the "inappropriate" justification has less societal value than the First Amendment. Secondly, the justification advanced is so vague, arbitrary and incapable of ascertainment that allowing it provides no basis for future students or newspaper advisors to determine what will or will not be deleted.

The "inappropriate" justification has already been rejected by this Court in a case involving official college recognition of a student group. In *Healy v. James*, 408 U.S. 169, 187 (1972) Justice Powell wrote, "The mere disagreement of the President [of the University] with the group's philosophy affords no reason to deny it recognition." Further, the Court said that it was not what the President thought that was determinative, but the evidence presented.

Ten years later, the Court reaffirmed that basic antipathy to arbitrary denial of First Amendment expression. Justice Blackmun in his concurring opinion in *Board of Education v. Pico*, 457 U.S. 853 (1982) stated that a school may not remove books from the library for the purpose of restricting access to political ideas or social perspectives when motivated by school disapproval of the ideas involved.

In my view, we strike a proper balance here by holding that school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved....[T]he school board must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, *Tinker v. Des*

Moines School Dist., 393 U.S., at 509, and that the board had something in mind in addition to the suppression of partisan or political views it did not share."

"Inappropriateness" is not an educational function but a standardization of ideas by the principal.¹³

This highlights again the problem of applying the same standard to student newspapers as to student expression. In a news or feature story, the author tries to present an objective balanced view of an issue. That may mean no obvious "viewpoint" is presented, that the primary purpose is to bring the topic into public debate.

D. Local Control Over Curriculum

The School District offers this Court the further state interest of absolute discretion in controlling curriculum.

The Hazelwood school board established *Spectrum* as part of its journalism curriculum. The school board incorporated professional journalism standards into its classroom. It placed freedom of the press as a main course objective. The community school board asserted that these high school students should "learn journalism" in the tradition of the nationally recognized University of Missouri School of Journalism. The curriculum was developed out of the excellence of the Pulitzer Prize and the St. Louis Post-Dispatch. By design, the high schools in the St. Louis area offer some of the finest

¹³However, the schools do not have an absolute right to remove materials from the curriculum.

At the very least, the First Amendment precludes local authorities from imposing a 'pall of orthodoxy' on classroom instruction... *Pratt v. Independent School District*, 670 F.2d 771,776 (8th Cir. 1982).

journalism education available in this country. Until this case arose, that journalism curriculum did not include the principal.

One day he usurped the teacher's role, replaced himself as advisor and changed the teacher-advisor position into that of editor. He then directed that only four pages of the student's work be distributed at school. These actions were not consistent with the Curriculum Guide, were not inherent in the previous pattern of classroom activity and were contrary to the purpose of journalism education as adopted by Hazelwood.

Previously, the advisor had not taken the role of editing. The curriculum had placed editorial control over content and layout in the hands of the student editors.

Spectrum was not merely a course exercise which remained in the files of the journalism department. The Hazelwood school board had made that decision based on sound educational policy. Some skills, such as leadership, judgment and self-reliance cannot be learned by rote classroom memorization regurgitated back onto a multiple choice test. These skills are learned through experimenting, making mistakes and trying again. A high school is under no obligation to teach these skills, although the societal value is clear. If the school board undertakes such a program and teaches Constitutional values by applying the First Amendment to its newspaper, then inconsistent actions of the principal do not serve an educational purpose.

In *Pico, supra*, the school district urged unfettered discretion in curriculum so that the school could transmit community values. That Court rejected the claim beyond "the compulsory environment of the classroom" and emphasized the voluntary nature of the school library. A newspaper sold to the school community which illustrates national democratic values by student expression of a major social problem such

as teen pregnancy is as voluntary as the library and subjects no "captive audience" to its content.

The primary purpose for maintaining local control over school curriculum is to safeguard community values. Here the subject of the student newspaper articles was taught in "Life and Families" class. That teacher presented some of his classroom views through his interview in one of the challenged articles.

The Curriculum Guide and board policy encouraged student expression on controversial issues in the student newspaper.

Although the principal himself said the content was "inappropriate" there is no showing that the articles' content was contrary to any community value. The school board did not vote to ban discussion of teen pregnancy. There was no established policy against any of these issues. The school district acted only to support the principal, not out of belief in a specific set of values. The superintendent did not even read the articles until several months later.

The basic educational mission includes teaching an accurate description of the laws governing society.

If the student is to learn by following role models, then giving a student editor-in-chief the responsibility of content choice cannot be withdrawn without voiding that educational experience. A poorly written article can be critiqued, given a poor grade or the advisor can be given further direction from the principal as to how to conduct the curriculum.

Each of the problems of which the school district complained could have been remedied without censorship by following regular journalism procedures that had been taught to that journalism class. Identifying information could have been deleted, a sentence could have been added that a certain person was not interviewed, a follow-up story could have run in the next issue, or a disclaimer could have been attached that the school did not endorse this discussion of these topics.

A call to an attorney would provide the principal with an opinion as to what specific fact could be deleted as libelous or an invasion of privacy. None of these things were done because the principal simply did not want these issues in the school paper. He took an intentional, contemplated act and told the District Information Officer to call the printer and delete two pages (Joint Stipulation #37; R. 142). The day of the censorship he made no mention of cost, libel or privacy. He said the stories were "inappropriate". He chose not to correct the problem he saw, while the censorship of this information cannot be remedied.

In summary, libel and invasion of privacy, as recognized compelling state interests by the *Tinker* court were not factually present here. The school district's suggested reasons of "inappropriate" content and local control over curriculum do not rise to a Constitutional level to outweigh the harms of reducing First Amendment protections for the student press, and teaching that the First Amendment does not fully apply to American youth.

III. SCHOOL CANNOT ACT ON BASIS OF COMPELLING STATE INTEREST WITHOUT WRITTEN REGULATIONS

Although there can be compelling state interests which allow the principal to delete newspaper articles, such actions are inimical to the tradition of freedom of the press in this country and should be implemented only when there are no other means available to uphold the school's compelling interest.

As Justice Powell stated in *Board of Education v. Pico, supra*, "...the destruction of written materials has been the symbol of despotism and intolerance." The purpose for allowing any censorship has been to avoid the harm which would result from publication.

This Court has indicated that prior restraint might be appropriate under judicial supervision with immediate judicial determination of the validity of the restraints. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

However, in this day and time it is impractical to have judicial review of every article on teenage pregnancy which a principal questions. The written appeal process can effectuate the desired judicial attitude by requiring objective review.

A school district does not have to assert its compelling state interest, but if it chooses to so proceed it should do so in a manner that is least restrictive of the students' First Amendment rights.

To insure the sparse use of these "censorship" tools and to minimize arbitrariness, courts have required that the school adopt and distribute specific written regulations prior to any pre-publication review. See Table I.

Lower courts have required that the written regulations:

- (1) state clearly the means by which students are to submit proposed materials to the principal;
- (2) state a brief and reasonable period of time during which the principal must make the decision;
- (3) specify the effect of the principal's failure to act promptly;
- (4) state clearly a reasonable appellate mechanism and its methodology; and
- (5) state a brief and reasonable time during which the appeal must be decided.¹⁴

¹⁴*Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973).

Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971).

The Second, Fourth and Fifth Circuits have followed this requirement for about 15 years without any substantial inhibition of the educational mission.

Any prepublication review regulations need to be designed to provide notice to student journalists as to what is printable. This would alleviate the problem of the student (or the advisor) guessing what the principal considers inappropriate.

At Hazelwood a student could not determine when the principal felt content was "inappropriate". For example, there was an article published on page three of this same issue where a student was quoted as saying that his little brother "gets to run around outside on weeknights and doesn't get in trouble like I did." (Joint Appendix 9).

At Hazelwood, the only written regulations set forth who had access, and the journalism goals. The school district admitted there were no regulations, written or oral concerning what could be deleted, by whom, and when. There was also no appeals process for any decision made, for access or deletion.

Having such regulations would most likely have prevented this extended litigation. The regulations would also prevent the principal from censoring based on disagreeing with the content of the story.

CONCLUSION

The school district has not put forth one goal of education which would be advanced by giving the principal the authority to arbitrarily delete pages from a limited public forum newspaper. Such deletion serves to show that the newspaper operates differently than the students learned in journalism class. The school wants unbridled control, and to abrogate the

First Amendment for our future citizens. By that control, the principal asserts that teenagers have no capacity to choose, to make the decision whether to be quoted or not, whether to talk to the press or not. The journalism students are not the only ones affected by this deletion. The discussion of these issues is imperative in high schools. The education of our youth so they understand and respect the principles of our Constitution as applied in a changing world remains one of society's highest goals.

Respondents request this Honorable Court to affirm the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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TABLE I
HIGH SCHOOL CENSORSHIP DECISIONS

FIRST CIRCUIT

CASE

HOLDING

Riseman v. School Committee of Quincy,
439 F.2d 148 (1971)

unconstitutional

SECOND CIRCUIT

Thomas v. Board of Education,
607 F.2d 1043 (1979)

unconstitutional

Trachtman v. Anker,
563 F.2d 512 (1977)

school upheld

Eisner v. Stamford Board of Education,
440 F.2d 803 (1971)

regulations
valid except
for lack of
review

District Courts

Frasca v. Andrews,
463 F.Supp. 1043 (E.D. NY 1979)

school upheld

Bayer v. Kinzler,
383 F.Supp. 1164 (E.D. NY 1974),
aff'd without opinion, 515 F.2d 504 (2nd Cir. 1975)

unconstitutional

Zucker v. Panitz,
299 F.Supp. 102 (S.D. NY 1969)

unconstitutional

FOURTH CIRCUIT

Williams v. Spencer,
622 F.2d 1200 (1980)

rules upheld

Nitzberg v. Parks,
525 F.2d 378 (1975)

unconstitutional

Baughman v. Freienmuth,
478 F. 2d 1345 (1973)

unconstitutional

Quarterman v. Byrd,
453 F.2d 54 (4th Cir. 1971)

unconstitutional

District Courts

Leibner v. Sharbaugh,
429 F.Supp. 744 (E.D. Va. 1977)

unconstitutional

Gambino v. Fairfax,
429 F.Supp. 731 (E.D. Va. 1977) *aff'd*, 564 F.2d
157 (4th Cir. 1977)

unconstitutional

TABLE I (cont'd)

FIFTH CIRCUIT

CASE

HOLDING

Hall v. Board of School Commissioners,
681 F.2d 965 (1982)

unconstitutional

Shanley v. Northeast Independent School District,
462 F.2d 960 (1972)

unconstitutional

SEVENTH CIRCUIT

Jacobs v. Board of School Commissioners,
490 F.2d 601 (1973) *vacated as moot*,
420 U.S. 128 (1975)

unconstitutional

Scoville v. Board of Education,
425 F.2d 10 (*en banc* 1970), *cert den.*
400 U.S. 826 (1970)

claim stated

Fujishima v. Board of Education,
460 F.2d 1355 (1972)

unconstitutional

NINTH CIRCUIT

San Diego CARD v. Governing Board,
790 F.2d 1471 (1986)

unconstitutional

District Courts

Pliscou v. Holtville Unified School District,
411 F.Supp. 842 (S.D. CA 1976)

unconstitutional

Poxon v. Board of Education,,
341 F.Supp. 256 (E.D. CA 1971),

unconstitutional

ELEVENTH CIRCUIT

District Courts

Reineke v. Cobb County School District,
484 F.Supp. 1252 (N.D. GA 1980)

unconstitutional

REPLY BRIEF

18
No. 86-836

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

VS.

CATHY KUHLMIEIER, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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Hafen, <i>Developing Student Expression Through In- stitutional Authority: Public Schools as Mediating Structures</i> , 48 Ohio St.L.J. 1, 42 (1987)	5-6 n.4
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English and Hach, <i>Scholastic Journalism</i> (6th ed. 1978) .	3-4 n.2
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I. The Policy And Practice Governing *Spectrum*

Respondents impute to the court of appeals a sweeping rejection of the district court's findings of fact. They baldly assert that the Eighth Circuit "rejected seven of the District Court's findings." Brief of Respondents 1. The accompanying citation implies that when the Eighth Circuit quoted from the district court's factual findings (App. A-5) and expressed disagreement with that court's ultimate *legal* conclusion, it was thereby dismissing all of the recited factual findings as "clearly erroneous." This interpretation is belied by the context in which the court quoted these findings, which was nothing more than a factual summary, and by the substance of the "rejected" findings, many of which were never disputed.

Respondents misapprehend the institutional role of this Court and the allocation of fact-finding authority established by Fed.R.Civ.P. 52(a). Rule 52(a) assumes an articulated determination by the appellate court as to what finding is clearly erroneous and why, *cf. Pullman-Standard v. Swint*, 456 U.S. 273, 290-91 (1982), something that did not happen here. See Brief for Petitioners 22 n.6. Even if the Eighth Circuit had rejected a finding of the district court, the question before this Court would not be "whether the [appellate court's] interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985). Respondents' extraordinary assertion that there is no evidence that the journalism teacher had any role in determining the content of *Spectrum* — let alone the authority the district court attributed to him — flies in the face of testimony of their own witnesses, including that of respondents themselves.¹ To the extent any statement by Robert Stergos,

¹ Cathy Kuhlmeier, for example, testified on direct examination that Stergos determined how many pages each issue would have (Tr. 1-27 to 1-28), and assigned all the stories (Tr. 1-29). She stated that he reviewed each typewritten draft. He would "[u]sually edit it and take

the former journalism teacher, conflicted with that evidence, it presented an issue of credibility uniquely within the province of the trial court. *Id.* at 575.

In failing to accede to the findings of the district court and the implications of their own testimony, respondents seek to remake *Spectrum* as a medium wherein Journalism II students published whatever they wanted free of any control by school authorities. That it was not “by practice” an expressive forum for the “indiscriminate use,” *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 47 (1983), of the Journalism II students is evident from the district court’s findings. And respondents’ argument that such a forum was created “by policy” relies on a strained and selective reading of school board guidelines and policies.

Respondents quote the Curriculum Guide’s Journalism I and II course outlines for the unexceptionable proposition that the purpose of both courses was to teach journalistic skills. Brief for Respondents 9-11. Since journalistic skills concern the “dissemination of views and ideas,” respondents maintain that

out what they (*sic*) felt shouldn’t be there, and had them rewrite it.” (Tr. 1-30 to 1-31). Kuhlmeier testified that Stergos selected which letters to the editor would be printed (Tr. 1-44), and on cross-examination she stated Stergos determined the length of each article. (Tr. 1-80).

Another of respondents’ trial witnesses, Mary Williams, put it succinctly.

Q. At the time we took your deposition you were asked about how articles were going to be written, and you stated that the final decision on articles, on the content of the articles, was Mr. Stergos.

Is that still your position?

A. Yeah, he approved everything or disapproved everything. (Tr. 1-125). Elizabeth Conley, a former student called by respondents, testified that she wrote a story on diabetes and Stergos made the decision that it would not be published. (Tr. 1-137).

the school board must have intended to make *Spectrum* a “public forum” for student expression. This argument ignores the Court’s maxim “that the mere fact that an instrumentality is used for the communication of ideas does not make a public forum.” *Perry Education Assn.*, 460 U.S. at 49 n.9. Moreover, identifying what is to be taught does not establish how it should be taught, and respondents ignore Section IV(A)(2)(c) of the Journalism II course outline, which does shed some light on the latter issue.

Section IV(A)(2)(c) was captioned “Suggested Activities: (Activities for the adviser)” and explicitly assigned certain responsibilities to the Journalism II teacher. He was to establish the budget and organize the newspaper staff “with responsibilities clearly established for each person.” J.A. 17. This section included an organizational chart which listed the journalism teacher *above* the student editors. J.A. 18. The Journalism II teacher was also to establish deadlines for the staff and “check with page editors regularly to see how ideas [were] developing.” J.A. 18-19. He was to “[c]arry on a dialogue with each editor continuously as to the newspaper’s content” and “[h]elp the staff turn bare ideas into well-researched, written, and edited stories.” J.A. 20. Finally, he was charged with a duty to discuss “newspaper ideas and content” with the principal “to know what he expect[ed].” *Id.* The school superintendent testified that “prior review of controversial or sensitive materials by a high principal was standard procedure.” App. A-29. Supervision of content by the journalism teacher subject to the principal’s ultimate review was, therefore, clearly recognized in the Curriculum Guide and certainly could not be construed as inconsistent with it.²

² Even those portions of the Curriculum Guide cited by the respondents indicate that *Spectrum* was not designed to be a medium for the unfettered expression of the journalism students. The Curriculum Guide’s “Writing to State an Opinion” unit of instruction for Journalism I specified as a course objective that the student would be

The first paragraph of Board Policy 348.51, entitled "School Sponsored Publications," provided:

School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.

J.A. 22. Various amici, as did the Eighth Circuit, cite only the first sentence and suggest that it prohibited the principal and journalism teacher from exercising any control over the publication. By its terms, however, this policy limited the publication *qua* publication: it did not grant a right to the journalism students vis-a-vis school officials, but rather imposed a duty upon the publication itself. Its purpose was to establish a procedure whereby nonjournalism students — students who were not part of the "publication" — could publish matters in a school-sponsored publication subject to faculty/student review and "the rules of responsible journalism." (Tr. 3-49 to 3-52). Pointedly, both the principal and journalism teacher were part of the review process.³ The second sentence of 348.51 reiterated the principle of curricular control for the journalism students, *i.e.*, those students who were part of the publication. (Tr. 3-51).

able to "identify the legal restrictions placed on the journalist such as copyright, libel, obscenity laws, [and] school policies." Brief for Respondents 10 (emphasis added).

Respondents claim some significance for the existence of chapters entitled "Understanding Press Law" and "Handling Sensitive Issues" in the recommended text for Journalism I and Journalism II. English and Hach, *Scholastic Journalism* (6th ed. 1978). Even if the teacher assigned these chapters, which were not specified in the Curriculum Guide, they do not suggest an intent to create a public forum any more than a textbook chapter on the First Amendment in a civics class.

³ J.A. 23. As a practical matter, other than letters to the editor, nonjournalism students did not seek access to *Spectrum* (Tr. 2-19 to 2-20), and a review board, as respondents concede, was apparently never established. The journalism teacher decided which letters to the editor were published. App. A-29.

The school board policy on "Controversial Issues", which is also relied on by respondents, was not addressed specifically to *Spectrum* or the journalism classes but to all classroom instruction. The policy explicitly made it "the responsibility of the teacher to see that the controversial issues discussed in the classroom are relevant to the course of study, limited to the level of understanding and age group of the student, and maintained within the bounds of objectivity commonly acceptable to the community." App. A-35. This admonition certainly did not transform the civics classroom into a public forum, and it gave no warrant for treating the journalism classroom any differently.

Finally, respondents cite an editorial captioned "Spectrum: Statement of Policy." J.A. 26. Judge Nangle found that this Statement was published in *Spectrum* on September 14, 1982 and "no documentary evidence was introduced to prove that this statement of policy was published at any other time." App. A-31 to A-32. This editorial declared that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution . . ." and quoted one of the variants of the substantial disruption standard articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). J.A. 26.

There was no evidence that this statement was approved by the school board or the principal. It was published prior to the pre-publication review procedure established by Principal Reynolds. As Judge Nangle noted, the editorial itself indicated it did not state an official school policy: "All non-by-lined editorials appearing in this newspaper [which included the "Statement of Policy"] reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East."⁴ In the absence of some affir-

⁴ J.A. 26; App. A-33. People for the American Way ("PFAW") contend that the existence of this statement in an issue of *Spectrum* dispels any notion that a student reader would construe anything in

mative endorsement by the school board, this "Statement" does little to illuminate the board's intent, particularly in light of the express policy of Journalism II and the practice that developed as a result of it. "The government does not create a public forum by inaction," and this Court "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 803 (1985).

II. The Nature Of *Spectrum* And Its Incompatibility With Indiscriminate Expression

Respondents also argue that *Spectrum*'s status as a public forum is dictated by its inherent characteristics, *i.e.*, the "nature of the property" and its "compatibility with expression." These considerations are not, as respondents suggest, wholly independent of the school board's intent as reflected in its policies and practices. They are only additional considerations in ascertaining that intent. *Cornelius*, 473 U.S. at 802. Given the findings of the district court on the policies and practices that governed *Spectrum*, it is inconceivable that the inherent characteristics of *Spectrum* could compel any different conclusion about the board's intent.

the pregnancy and divorce articles as being endorsed by the school. Brief for PFAW 12 n. 2. Even if the student reader happened to see this issue and read the editorial, the disclaimer only pertained to "non-by-lined editorials." It made no mention of articles or features that appear within the newspaper, despite the suggestion of the Eighth Circuit to the contrary. App. A-6 to A-7. But the notion that even a proper disclaimer removes the endorsement problem is unrealistic, as the Court has recognized in other contexts. "Query whether this same reasoning would allow the school to post a copy of the Ten Commandments on the walls of Hazelwood High School without violating the establishment clause, so long as small print at the bottom of the poster states that the poster does not necessarily reflect the views of the administration or faculty." Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St.L.J. 1, 42 (1987) (citing *Stone v. Graham*, 449 U.S. 39 (1980)).

In considering the nature of the property and its compatibility with expression, the Court has inquired whether "the principal function of the property" would be undermined by "general," "unrestricted," *id.* at 803, 809, 811, or "indiscriminate" expressive activity, *Perry Education Assn.*, 460 U.S. at 47. As *Cornelius* demonstrates, expression is not "compatible" with a publication simply because it is amenable to the written word. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

Petitioners agree with respondents that the primary purpose of Journalism II and *Spectrum* was to teach journalistic skills. Yet respondents have remarkably little to say about the compatibility of *this* purpose with the publication's status as a public forum. What they do say is tautological. Teaching journalistic skills demands a definition of "journalistic skills" and a choice of teaching methodology. Respondents' "compatibility" argument is premised on the assumption that there is one dominant skill to be taught — asserting freedom from any control or direction by a school authority — and consequently only one proper way to teach "journalistic skills," what an amicus has characterized as a " 'laissez-faire' attitude": teachers and administrators may only be passive sources of advice and the final decision on content must be the students'. Brief for Dade County School Board 9.

Whatever the educational merits of a laissez-faire approach, there is no reason to conclude that it is the only appropriate way to teach "journalistic skills." Journalistic skills obviously embrace, *inter alia*, the abilities to write; to edit; to create an accurate, fair and objective article; to handle issues with sensitivity and balance; to lay out a page; to meet a deadline; and to respond to a publishing authority. In the secondary school classroom, these "basics" are certainly as important — indeed more important — than the license to publish anything the student wishes in a school-sponsored publication. Why can these skills only be taught — or even best be taught — by denying the

journalism teacher the authority to require revisions to articles, to make decisions that articles will not appear in the paper without certain changes or otherwise to be actively involved in the publication process? As with all teaching, there are matters of judgment about which individuals may disagree, but which are within the discretion inherent in the teaching function. This discretion is incompatible with a public forum. As Justice Stewart observed in his concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 140 (1973) (Stewart, J. concurring), public forums "are inevitably drawn to the position of common carriers."

On closer analysis, public forum status is incompatible with a "laissez-faire" curricular newspaper or, for that matter, the exercise of editorial discretion by student editors. If given the inherent characteristics of a school-sponsored newspaper, a journalism teacher cannot exercise, consistent with the First Amendment, direct control over the publication absent a "compelling interest," the informal but unavoidable coercion of the journalism teacher's advice and authority to grade will not likely pass constitutional muster either. See *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Even if the school district dismantled this system of informal coercion, and clearly vested final authority over this "public forum" in a group of student editors, these students have little they can lawfully edit. For if they can lawfully prevent or forestall publication by other class members for a less-than-compelling reason, the property is by definition no longer a public forum.

If the answer to this seeming paradox is that by vesting editorial discretion in the students the State expressed its intent to create a nonpublic forum, then its intent is equally clear when it vests all or a part of that discretion in the teacher and school principal. That *Spectrum* was a vehicle for teaching and learning "journalistic skills" necessarily implies the discretion inherent not only in the teaching function, see *Ambach v. Norwick*, 441 U.S. 68, 78 (1979), but also in the editorial function,

see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Such discretion is squarely incompatible with the "general" or "indiscriminate access" of a public forum.

III. Alternatives To The Public Forum Doctrine

Possibly due to this incompatibility, respondents and some amici urge approaches other than the public forum analysis employed by the Eighth Circuit to salvage that court's result.¹ PFAW and the ACLU suggest that public forum analysis concerns denials of "access" to public property, and since the staff of *Spectrum* already had "access" — at least in the sense they may have published something in *Spectrum* in the past — "public forum analysis is not helpful." Brief for PFAW at 8; see Brief for ACLU at 31 n.17. But "access" used in this way is a vague and unworkable concept. The demand for access to property and the character of expression are inextricably intertwined. The students who were members of Cornerstone, the religious group involved in *Widmar v. Vincent*, 454 U.S. 263 (1981), undoubtedly had access to the facilities of UMKC as students and as members of other student organizations. They

¹ Respondents contend that *Spectrum* is part of "the press" specifically protected by the First Amendment and, therefore, constitutionally on par with the St. Louis Post-Dispatch. Brief for Respondents 17. This Court has never held that the Press Clause "confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring). Respondents also use the private press analogy very selectively. The First Amendment does not grant the publication's reporters or editors a right to resist the control of their publisher over access to the publication. Yet respondents' position is that regardless of the school board's intent, by creating a "newspaper" the board forfeited all the traditional prerogatives of a publishing authority. If this Court endorses that position, a high school "student" journalist writing for a class-produced, school-sponsored newspaper, for academic credit and a grade, has more legally enforceable autonomy than the most respected journalists at the nation's most prestigious newspapers.

were denied "access" to engage in a particular type of expression, religious worship and discussion. A citizen of Shaker Heights may have had access to the advertising spaces on city buses to promote his car dealership but not his candidacy for license collector. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). This Court's analysis has not turned on whether the plaintiffs had prior physical access to these facilities, and the Court has explicitly stated that public forum analysis also governs denials of access based on subject matter. *Perry Education Assn.*, 460 U.S. at 46 n.7.

The alternative analytical framework urged by respondents and supporting amici is that of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). But *Tinker* involved an instance of viewpoint discrimination, a point explicitly acknowledged by both the majority and dissent in *Perry Education Assn.* Compare 460 U.S. at 49-50 n. 9 with *id.* at 57-58. *Tinker* is properly understood as a reformulation of the compelling state interest standard "in light of the special characteristics of the school environment." 393 U.S. at 506. It articulates the *highest* level of scrutiny within the secondary school, not the *only* level. Respondents concede that this case does not involve viewpoint discrimination, Brief of Respondents at 29, and suggestions to the contrary by some amici are contrived and contradictory.⁶

⁶ The National Organization for Women ("NOW"), the Student Press Law Center, and the ACLU argue that petitioners engaged in viewpoint discrimination because the district court found that the removal of the pregnancy profiles was a reasonable attempt to avoid the appearance of official endorsement of the sexual norms of the pregnant students. This reasoning trivializes the concept of a "viewpoint" and suggests that all expression implicitly has one. A viewpoint has been defined as a "partisan opinion or belief" or "distinctive intellectual position," Webster's New International Dictionary 1904, 2842 (2d ed. 1959), and the fact of, or a proclivity for, sexual intercourse could not be construed as either. A better argument could be made that there was a "viewpoint" toward sexual relations implicit in

Since this case involves school-sponsored expression produced as a class exercise, it also implicates concerns beyond the problem of discipline addressed in *Tinker*: the school board's control over curriculum, its legal liability for expressive activity that occurs in a school-sponsored publication or forum, and the implicit school endorsement that accompanies school-sponsored student expression. *Tinker* involved noncurricular, privately-initiated, privately-sponsored expression and, therefore, did not attempt to accommodate these concerns.

Some amici dismiss the issue of curricular control by arguing that the decision not to publish two pages of *Spectrum* was made by the principal and not "truly necessitated by curricular concerns." Brief for PFAW 2. As a factual matter, however, the extant journalism teacher, Howard Emerson, who had substantial experience as a journalism instructor, agreed with the decision to delete pages 4 and 5. (Tr. 2-74, 2-168 to 2-173). That his predecessor might have thought that the articles were appropriate and sufficiently solicitous to the privacy interests of

Fraser's speech "glorifying male sexuality." *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986). "Viewpoint," however, has never had such broad connotations in this Court's cases. Fraser's speech did not make him a "partisan or enemy of any class, creed, party or faction" as those concepts are commonly understood. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). See *Fraser, supra*, at 3166 (school's disciplining of Fraser "unrelated to any political viewpoint").

The absence of any discernible viewpoint in the pregnancy profiles is illustrated by the inconsonant attempts to define it. Compare Brief for ACLU 20 (student profiles reflect "relatively positive views on pregnancy") with Brief for NOW 22 (student profiles "made the crucial connection between early sexual activity, unwanted and unplanned pregnancies, and severe educational and economic hardships").

students and their families does not make the earliest judgment "curricular" and the latter something else.⁷

Nor is there any legal justification for preferring the judgment of the journalism teacher over that of his superior, the principal. The principal was the educational leader of the school, expressly charged with a role in the journalism process by the Curriculum Guide and school district policy. A constitutional standard that distinguished among the educational judgments of state actors within a secondary school system would destroy the concept of curricular control by local school boards and their appointed administrators. "Educational decisions must be made by someone; there is no reason to create a constitutional preference for the views of individual teachers over those of their employers." *East Hartford Education Assn. v. Board of Education*, 562 F.2d 838, 859 (2d Cir. 1977) (en banc).

The criticism that the principal's decision was not "pedagogical" is misplaced. Since *Spectrum* was a nonpublic forum, the issue is whether his decision was "reasonable." The criticism is also myopic. Since the teaching of journalism is concerned with balance, fairness, avoiding unwarranted invasions of privacy, and the appropriate limits of an audience's right to

⁷ A few amici make the related argument that the articles were in "final form" and had passed through the "teaching phase" prior to Stergos' departure, and that nothing that occurred beyond that point could be "curricular." Brief for ACLU at 2; Brief for American Society of Newspaper Editors ("ASNE") 13. This again begs the question why Stergos' judgment that the articles were appropriate, balanced and fair was pedagogical, while the judgments of Reynolds and Emerson to the contrary were not. The educational process does not have tightly defined phases. Moreover, the articles were not in final form when Stergos left. (Tr. 2-13 to 2-14). In fact, Stergos testified he would not have allowed names to be used in the divorce article had he been the teacher when the articles were printed. (Tr. 2-53 to 2-54).

know, they are obviously proper pedagogical considerations for the teacher and the principal. Further, the decision to distribute *Spectrum* reflected not only an educational judgment that Journalism II would be most effective if the publication had an audience outside the classroom, but also that the educational experience of the general school population would be enhanced by its availability. "In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials." *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in judgment). There is even greater force to this observation in the more controlled environment of a secondary school. What product of a compulsory classroom exercise is appropriate to distribute to students generally, under the official aegis of the school, is as curricular or pedagogical a determination as the selection of a textbook. Given the principal's responsibility for the student body as a whole, he is uniquely positioned to make that determination. In truth, respondents' objection is not that the principal failed to make an "educational" decision, but that he failed to make a wise educational decision, with adjectives like curricular and pedagogical reserved for those decisions they endorse. "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

While criticizing the principal's actions as not being "pedagogical," some amici also argue, somewhat inconsistently, that the deleted material had extraordinary educational implications. Relying on this Court's opinions in *Bigelow v. Virginia*, 421 U.S. 809 (1975), *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), they contend that the articles involved "reproductive health issues" and, therefore, their deletion triggers the highest level of judicial scrutiny even in the absence of viewpoint discrimination.

Bigelow, *Carey* and *Bolger* involved governmental restrictions limiting the ability of private publications or the U.S. mails to convey commercial speech about abortion services or contraceptives. All three cases involved privately-initiated speech — not compelled discourse on topics assigned in a secondary school classroom. In each the Court concluded that commercial speech involving abortion or contraceptives is entitled to more First Amendment protection than the normal advertisement. The Court did not conclude that such speech in noncommercial settings, let alone in the schools, is entitled to greater constitutional protection than other types of noncommercial discourse. The Court, in fact, acknowledged the State's greater latitude to regulate information on sexual matters directed to minors as opposed to adults. *Carey*, 431 U.S. at 693 n.16. Given the inculcative role of the schools, the State's authority to regulate in these areas is necessarily greatest within the primary and secondary schools generally, and with regard to school-sponsored sources of information in particular.

In the last analysis, cases like *Carey* and *Bolger* are simply beside the point. This is not a case about sex education, despite the fervent efforts of some amici to make it one. Articles on teen pregnancy have appeared in *Spectrum* in the past. App. A-28. Petitioners readily agree that teenage pregnancy is a serious problem and that school districts have an educational — as opposed to constitutional — duty to provide meaningful information about the hazards of teen pregnancy and the importance of responsible procreative choices. Likewise, there is educational merit in information dealing with divorce and its emotional impact. But that information need not and should not be conveyed at the expense of any individual student or student's family. Cf. *Bigelow v. Virginia*, 421 U.S. 820, 828 (1975) ("no possibility that appellant's activity would invade the privacy of other citizens . . . or infringe on other rights"). The reliance on *Carey* and *Bolger* is ironic because those cases demonstrate a solicitude for the privacy of minors in procreative matters. Yet they are being invoked here to dismiss privacy con-

cerns in light of an exaggerated and seemingly boundless constitutional right on the part of secondary school students to information "essential to enable these individuals to cope with their worlds." Brief of NOW 15. This is in contrast to the cavalier way in which respondents dismiss concerns about the ability of the pregnant students to cope with theirs.⁹

IV. Reasonableness

The reply of respondents and their supporting amici to the latter concerns is to deny their legitimacy. As with the Court of Appeals, it is enough that the students consented. Yet respondents concede that the legal sufficiency of a minor's consent to an invasion of her privacy is ineffective if she was "incapable of understanding or appreciating the consequences of the invasion." Brief for Respondents 24, citing Restatement (Second) of Torts §59. Respondents assume there was no problem of such incapacity here and that petitioners' only legitimate concern was legal liability.

This Court has not so readily presumed the maturity of minors or so narrowly limited a State's legitimate interest in protecting them. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). Since "young persons frequently make unwise choices with harmful consequences; the State may properly ameliorate those consequences. . . ." *Carey v. Population Services International*, 431 U.S. 678, 714 (1977) (Stevens, concurring in part and in judgment). Only last Term, in confronting the Establishment Clause issue presented by *Edwards*

⁹ "When a teen continues in school while five months or more pregnant, she has made her sexual activity public, and being interviewed in the school paper does not invade her privacy yet it provides other students with important information." Brief of Respondents 26.

v. Aguillard, 107 S.Ct. 2573 (1987), the Court made observations about secondary schools and their students that are relevant to this case.

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. *Students in such institutions are impressionable and their attendance is involuntary. . . .* The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and *the children's susceptibility to peer pressure.*

Id. at 2577 (citations omitted) (emphasis added).

There is certainly no reason to believe students interviewed for the pregnancy and divorce articles were any less impressionable or susceptible to peer pressure than the average student. And there is certainly some element of both the State's "coercive power" and peer pressure when a student, who is compelled to attend school, is approached by another student, possibly an upperclassman, for an interview for a journalism class project that will appear in the school-sponsored newspaper. Under those circumstances school authorities have a *duty* to ensure that the privacy of individual students and their families are respected.

Respondents and various amici make tortured attempts to show that neither the students nor their families had any legitimate privacy interest in what was to be published.⁹ They

⁹ Their shared methodology is to assume away any awkward facts. For example, the ASNE assumes that all three students were visibly pregnant while attending class and the fact of their pregnancy was therefore public knowledge. The article indicates, however, and the district court found, that at least one of the girls had withdrawn from school. Compare Brief for ASNE 8 with App. A-43.

choose to overlook that the students featured in the pregnancy profiles were promised, and presumably wanted, anonymity. This heightened the potential emotional harm that would result from disclosure. The principal reasonably believed, as the district court found, that there was a high risk of identification, a judgment he is probably better positioned to make than any individual student or teacher. Certainly he would be acting reasonably if he prevented the school-sponsored publication from listing the names of all pregnant students attending school, even in the absence of the biographical trappings of the articles in this case.

Respondents and their supporting amici largely ignore the minority of the profiled students and of *Spectrum's* audience, some of whom were no more than 14 years of age. There is nothing unreasonable about the assumption that students who are "impressionable" and susceptible "to peer pressure" in matters of religion, *Edwards, supra*, are also unsophisticated and immature in matters of human sexuality and interpersonal relationships. As a result of this immaturity, there is nothing "frivolous," Brief for ACLU 43 n.25, about the principal's concerns that the parents of the students profiled in the divorce and pregnancy articles had not been consulted.¹⁰ Families who "entrust public schools with the education of their children" with the expectation that the classroom will not be used to undermine their "private beliefs" also reasonably expect the school's solicitude to the privacy of their children and themselves. Public schools properly protect children "from their own immaturity by requiring parental consent to or involvement in important decisions by minors." *Bellotti v. Baird*, 443 U.S. 622, 637 (1979).

¹⁰ Respondents' assertion that the author of the divorce article obtained the consent of both the quoted students and their parents is simply wrong, as demonstrated by the district court's findings (App. A-39) and the author's testimony (Tr. 2-95 to 2-96).

Respondents contend the articles were deleted because the principal believed that divorce and teen pregnancy were *per se* inappropriate topics for the school-sponsored newspaper. The district court properly concluded that was not the case.¹¹ (App. A-57). What Reynolds found inappropriate was the use of personal profiles of and quotations by students within the school relating the circumstances of their pregnancies or the reasons for their parents' divorces. Certainly the determination of whether this "manner of speech" is appropriate in a class-produced, school-sponsored newspaper is within the reasonable discretion of school authorities. *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986).

Suggestions by respondents and amici that the principal had alternatives other than deletion of the articles have a hollow ring, for their arguments also presume the principal had no authority to compel changes in the articles. In addition to highlighting their removal, excision of only the two articles would have destroyed the integrity of the two-page layout — something respondents would presumably find as objectionable as deletion. Had the controversy not arisen so late in the school year, the nonobjectionable articles and modified versions of the pregnancy and divorce articles could have run at a later time in a coherent format. The reasonableness of a decision must be gauged within its context, and the district court's conclusion is entitled to substantial weight in this Court.

Finally, respondents argue that the written regulations that governed *Spectrum* were unconstitutionally overbroad and vague. They rely on lower court cases involving privately-

¹¹ The Eighth Circuit was in error — an error compounded by its use of quotation marks — when it stated that the school district believed " ' divorce is per se an inappropriate subject for high school newspapers.' " App. A-14. This is unsupported by the record, directly contradicted by the district court (App. A-56 to A-57), and further testament to the confusion created when the letter and spirit of Fed.R.Civ.P. 52(a) are ignored.

initiated, nonschool-sponsored expression. As the district court noted, the "full panoply of precise substantive and procedural regulations is not required within the context of a program that is an integral part of a high school's curriculum." App. A-57. Curricular matters demand a high degree of informality and flexibility — particularly for subject matters as broad and varied as journalism. See *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3166 (1986). Moreover, a characteristic of a nonpublic forum is that there need not be precisely defined limitations on access; a restriction is permissible so long as it is reasonable in light of the purposes of the forum.

It is striking the degree to which respondents and some amici use the language of education to justify displacing the flexibility of educational judgment with a relatively static constitutional proscription. Teaching the power and responsibility of free expression with sensitivity for the immaturity of secondary school students is best left to an educational policy that encourages as well as prohibits, and that is informed by and changes with experience. The Constitution, which does not mention education, properly inspires our educational policy; but it should seldom dictate it, lest it further aggravate the "adversarial and legalistic character" of faculty-student relationships in our secondary schools. Grant, *The Character of Education and the Education of Character*, 18 *American Education* 37, 41 (1982). "[A] school faculty must regulate the content as well as the style of student speech in carrying out its educational mission." *Fraser*, 106 S.Ct. at 3169 (Stevens, J., dissenting). At times educators will make decisions others believe insensitive or unwise, but that is true of all judgments. As Judge Wollman observed in his dissent, judges have no monopoly on wisdom in these matters. The price of moving these decisions from the schoolhouse to the courthouse is to deny educators the sense of involvement and responsibility they must feel to be effective and to deny students the direction and discipline they need to learn.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 86-836

8

IN THE
Supreme Court of the United States
October Term, 1986

Hazelwood School District, et al.,
Petitioners,
v.

Cathy Kuhlmeier, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF OF NATIONAL SCHOOL BOARDS
ASSOCIATION AND NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS AS
AMICI CURIAE SUPPORTING PETITIONERS

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MOTION OF NATIONAL SCHOOL BOARDS
ASSOCIATION AND NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS FOR LEAVE
TO FILE BRIEF AS AMICI CURIAE

The National School Boards Association
(NSBA) and the National Association of
Secondary School Principals (NASSP) move
this Court for leave to participate as
amici curiae herein for the purpose of
filing the attached brief.

NSBA is a nonprofit federation of this nation's forty nine state school boards associations, the Hawaii Board of Education, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and the educational and curriculum standards of the public schools.

The National Association of Secondary

School Principals (NASSP) is a voluntary association of approximately 38,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools.

The NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in the school environment and in the role of education in society. It promotes research and development in curriculum standards and course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to

focus attention on national educational problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

The fact situation in this case is not unique. The policy in Hazelwood School District of operating school newspapers as a part of the journalism curriculum is a common policy throughout the country and is a continuing trend in areas where the policy is not as prevalent. NSBA and NASSP seek leave to file the attached brief because the decision in this case will have an impact on school districts throughout the country.

The court below looked on this case as if it were a case of the State attempting to censor a private newspaper. The court discounted educational arguments

concerning the need for school administrations to exercise oversight over the curriculum, including school newspapers. Because these educational considerations are essential to a fair and expeditious resolution of the issues in this case, NSBA and NASSP respectfully urge this Court to allow them to provide a brief overview of these educational arguments.

Respectfully submitted,

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BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AND NATIONAL ASSOCIATION OF SECONDARY
SCHOOL PRINCIPALS AS AMICI CURIAE
SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amicus curiae, National School Boards
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federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

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voluntary association of approximately 38,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools.

NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in the school environment and in the role of education in society. It promotes research and development in curriculum standards and course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to focus attention on national educational

problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

Although amici NSBA and NASSP do not customarily seek to intervene in private litigation, they believe that this case involves issues of such fundamental public importance as to make an expression of their views essential. Amici believe that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators and boards be able to appropriately regulate student expression in school sponsored and curricular activities.

ISSUES PRESENTED FOR REVIEW

1. Is a school-sponsored high school newspaper produced and published by a journalism class as part of a school-adopted curriculum, under the teacher's supervision and subject to the principal's review, a "public forum" for purposes of the First Amendment?
2. May school authorities act to prevent invasions of rights of others by a school-sponsored newspaper only when the failure to do so would subject the school to tort liability?

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

ARGUMENT

I. INTRODUCTION

The "free speech" right is one of the most cherished rights guaranteed by the

Constitution. Certainly student journalists, like other students in elementary and secondary schools, do not "shed their constitutional rights to freedom of speech or expression at the school house gate," Tinker v. Des Moines Indep. Community School District, 393 U.S. 503, 506 (1969). But nor do student journalists have any greater free speech rights than do other students.

This Court has recognized that the First Amendment must be "applied in light of the special characteristics of the school environment." Tinker, 393 U.S. at 506. The same is true when a student exercises his rights through a school newspaper and claims a right of "free press."

The ruling of the court below typifies a recent tendency of lower courts to overstep their function and expertise

by overturning educational policy decisions of educators based on the court's own assessment of the merits of the decision, rather than on a solid legal foundation. Furthermore, the opinion below both misapplies this Court's decision in Tinker and ignores the Court's more analogous decision in Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

II. SCHOOL NEWSPAPERS ARE NOT "OPEN FORUMS"

A. School-sponsored newspapers are part of the curriculum.

Newspapers like the one in the instant case, financially supported by the school system, composed and published on school premises by students qua students, and under the supervision of school staff, are inevitably and properly viewed as part of the school program and should remain under the control of the school board, as

the legally constituted authority for the curriculum.

The Eighth Circuit opines that since the school has authorized the students to decide what topics to cover in the articles to be written and published, it is a public forum. - Certainly by giving students the responsibility of writing the newspaper, the school district does not relinquish control over it.

The close relationship of the school district with its official student publications makes the district accountable in the public mind for those publications. For the school board or the principal to assert that student authorship or editorial services remove the school from responsibility for such publications will not be accepted by the public. Nor should it be, when it is the

public who bears the cost of operating the public schools.

Both the Ninth Circuit in Fraser v. Bethel School District No. 403, 755 F.2d 1356 (9th Cir. 1985), and the Eighth Circuit in this case construed "curriculum" narrowly, apparently only to include textbooks. However, a school's curriculum encompasses much more than textbooks and includes a variety of instructional materials such as computer software, interactive video disks, video tapes, films, science lab materials, microforms, photographs, slides, cassettes and school newspapers.

Hazelwood School District is not unique in its treatment of school newspapers. Schools that offer journalism courses commonly use the second semester as a "hands on" lab where students write a newspaper under the guidance of the

journalism teacher and distribute it to students. Schools provide students the opportunity to run a newspaper as a part of the curriculum because it is an excellent method of teaching students about the "real world" of journalism. Students learn not only writing and editorial skills, but also the legal and ethical responsibilities which are known to all responsible journalists. As the district court noted in this case, the Journalism Guide for Journalism II provides that students learn "the legal, moral, and ethical restrictions imposed upon journalists within the community." Appendix to Petition for Certiorari at page A-26.

Typically, schools offer journalism courses as part of the English curriculum and grant English credit for completion of the course. For example, 33 school

districts in the Metropolitan St. Louis area are members of an organization called "Sponsors of School Publications." A substantial majority, if not all, of the members of the organization sponsor the school newspaper as part of the journalism curriculum. The writing, editing and publishing of the newspaper in these school districts is as much a part of the English curriculum as a textbook.

B. The schools' educational mission prevents curricular activities from constituting public forums.

Although this Court's decision in Fraser does not expressly rest on whether or not the student's expression was made in a "public forum," the language of the decision indicates that the outcome might have been different had Fraser's remarks been on the playground during a break or the cafeteria during lunch. "The determination of what manner of speech in

the classroom or in school assembly is inappropriate properly rests with the school board." Fraser, 106 S.Ct. at 3165. The Court viewed this determination as part of the school's educational responsibility.

Justice Stevens in his concurring opinion in Widmar v. Vincent, 454 U.S. 276, 278-280 (1981), which involved the question of whether religious groups should be allowed to meet on school grounds, recognized that in carrying out their "learning and teaching missions" public colleges and universities necessarily "make countless decisions based on the content of communicative materials." These decisions include selection of library books, hiring of professors based on their academic philosophies, selection of courses for the curriculum and rewarding scholars for

written works. This decision-making power extends to the content of extracurricular activities in which the school encourages students to participate. The educational function of public institutions places limits on the scope of the First Amendment freedoms that exist in these forums. Justice Stevens expressed this view as follows:

...I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill." Id. at 280.

While a university cannot deny access to a forum based on its disagreement with the viewpoint expressed, it "legitimately may regard some subjects as more relevant to its educational mission than others." Id.

Public elementary and secondary schools, no less than public universities, make many important decisions based on the

content of communicative materials in order to promote their educational mission. Certainly, if a university may exercise certain controls over the content of student activities outside the curriculum, a public high school may do the same with regard to a newspaper which is school-sponsored, faculty-supervised, and an integral part of the schools' journalism curriculum.

C. Because school-sponsored newspapers are curricular activities, the Tinker standard does not apply

1. The Tinker standard does not apply to student expression in a school-sponsored activity.

The court below based its decision on a finding that a school newspaper is a "public forum." Thus, the court subjected the school officials to a First Amendment standard similar to that imposed on the state with regard to private newspapers.

Among the cases cited by the court of appeals in support of its public forum holding is Fraser v. Bethel School District No. 403, 755 F.2d 1356 (9th Cir. 1985). That decision held that a school-sponsored assembly was not part of the curriculum and, therefore, students were "free to exercise their individual judgments about the content of their speeches." Fraser, 755 F.2d at 1364.

On the same day that the Supreme Court reversed the Fraser ruling relating to school assemblies, Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159 (1986), the court of appeals rendered its decision in this case. Petitioners motion for rehearing en banc gave the Eighth Circuit the opportunity to correct the conflict between its decision and the decision of the Supreme Court. Nevertheless the motion was denied, presumably because the

court believed that the standard in Tinker applies, rather than that in Fraser.

The analysis of any First Amendment case must begin with an examination of the facts. More so than in other types of cases, the facts in First Amendment cases are crucial to their holding. That is certainly true in Tinker. Many lower court decisions, like the lower court's opinion here, imply that Tinker stands for the proposition that school districts may never limit student speech in absence of a showing that the speech is materially and substantially disruptive or impinges on the rights of others. E.g., Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Reineke v. Cobb County School District, 484 F.Supp. 1252 (N.D. Ga. 1980). By failing to consider the facts in Tinker, these courts have erroneously extended its holding to apply to all

student speech.

The Eighth Circuit committed this error in the case at bar. By refusing to reconsider its decision in light of this Court's ruling in Fraser, the Eighth Circuit equated school newspapers more closely to the wearing of symbolic armbands than to a speech in a school-sponsored assembly. It is difficult to understand why.

Because the wearing of armbands was certainly not part of any school-sponsored activity, the school officials in Tinker could not justify their regulation of the content of the speech in the absence of a disruption. On the other hand, the school officials in the case at bar should have the right to make content-based decisions as to whether or not to allow certain articles to appear in a school-sponsored newspaper distributed to the student body.

It defies logic to rule that a school does not have the authority to make educational decisions about whether particular articles are appropriate for a school-sponsored newspaper that is part of the school curriculum.

2. Tinker's test of substantial disruption does not apply to regulation of student speech for legitimate educational reasons.

The holding in Tinker is replete with references to the type of "pure" speech at issue in that case, i.e. "symbolic speech" or political speech. This Court noted that in regulating the content of a student's speech, a school district must be guided "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. In comparison, no evidence in the instant

case indicates that the pages were removed from the newspaper because of an unpopular viewpoint. On the contrary, the school authorities deleted the stories solely because of their highly personal nature and inappropriateness for a school-sponsored newspaper.

The Tinker Court also emphasized that the school district had not prohibited wearing of all armbands, or of buttons or T-shirts with statements thereon, but had singled out black armbands worn as a symbol of the students' disagreement with the Viet Nam War -- a political statement. The motivation of the school officials was found to be discriminatory and not based on any valid educational rationale. Although noting that students' First Amendment rights in the public school context are not the same as those of adults, the Court held that as to silent

political statements, a student's free speech right differs little in the school context than outside the classroom. That form of speech cannot be regulated except as to "time, place and manner" and so as to prohibit "substantial and material disruption" or interference with the rights of others. But, it is silent, political statements to which this standard applies.

Similarly in Board of Education of Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982), involving the question of whether a school board violated students' First Amendment rights by removing certain books from the library, even the respondents in that case agreed that if the removal was because of the "educational unsuitability" of books, that removal would be permissible. Justice Brennan, writing the plurality

decision, noted that "[p]etitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner." 457 U.S. at 870. Since the "motivation" of the school board was not clear from the record, the case was remanded for a finding on that issue.

Even assuming arguendo, that under the Pico plurality rationale, student expression in the context of curriculum is protected from regulation by school officials motivated by political, rather than educational, interests, the facts here do not present such a situation. The school officials removed the material because it was educationally unsuitable and raised serious privacy issues, not because of any political reasons.

In sum, the Tinker standard is

inapplicable here for two reasons: first, the Tinker speech was not related to any school-sponsored activity; and second, Tinker dealt with political speech rather than a less fundamental kind of speech that was educationally inappropriate and might invade the privacy rights of others. Both of these factors were crucial to the holding in Tinker. Since those factors are not present here the "substantial and material disruption" standard is inapplicable.

We should note that, although the Tinker standard may apply to "underground" newspapers which are not sponsored by the school district, a distinction exists between official publications and those which are published by students as private individuals. In the latter case, the school's concern and its degree of control are properly limited to those kinds of

actions it might carry out regarding the actions of anyone on school property. These would include regulation of time, place and manner of distribution to avoid disruption of school activity. While regulation of content would be limited in such cases, even then it should be permitted where there is a material and substantial disruption or the material impinges on the rights of others. Tinker, supra.

III. SCHOOL AUTHORITIES MAY PREVENT PUBLICATION OF ARTICLES IN A SCHOOL NEWSPAPER WHEN THEY REASONABLY BELIEVE THOSE ARTICLES INTERFERE WITH THE RIGHTS OF OTHERS.

Although Tinker is cited by lower courts primarily as prohibiting interference with student speech except where it is "disruptive," of school activities, the standard enunciated by the Court included another test: "...he may

express his opinions...if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." 393 U.S. at 513. This alternative criterion by which administrative control is justifiable is often overlooked. In the school context that interference could result in a suit in tort or it could merely interfere with the school's commitment to protect students and their parents from invasions of their privacy.

A. A school may reasonably limit student speech in a school-sponsored newspaper in order to avoid liability in tort.

The Eighth Circuit ruled that school officials may limit student speech only when publication of that speech could result in tort liability for the school.

The court, however, makes its own determination as to whether the school district, if sued in tort, would win. If potential tort liability is to be a standard, it would seem that the court should oversee only the reasonableness of the fear of the suit, not whether such a suit would succeed. Principals are not judges or lawyers. Often they have no ready access to legal counsel, and they must decide and decide quickly.

School districts which provide the educational opportunity for students to write and prepare a school newspaper must be allowed to set their own standards of propriety in determining what to publish so that they may protect themselves from possible tort liability. When a school district sponsors a newspaper in this manner it, like any other publisher, cannot be expected to give its writers

free rein to decide what should appear in print. Obviously, each publisher must decide what risk it wishes to assume in determining what is appropriate for publication; for example, the New York Times has chosen to avoid some of the risks of legal liability which the National Enquirer eagerly embraces. Likewise, a school district, as publisher, must be able to set its own limitations on the risks to which it wishes to expose itself.

A school district should not be required to forecast whether a court will view a particular student article as entailing potential tort liability before it decides that the article should not appear in a school-sponsored publication. Nor should the fact that the school district chooses to follow a more conservative course in its approval of

material for publication, rather than walk the line between tortious invasion of privacy and nontortious reporting, expose it to suits by student-journalists for alleged First Amendment violations.

Nor is ultimate liability for a judgment the only appropriate justification for the school's exercise of authority. If the Eighth Circuit's restraint on school officials' authority to limit student speech remains intact, schools that cannot afford the legal fees necessary to defend against claims of constitutional violations on one hand or tort suits for invasion of privacy on the other and that cannot risk possible liability for damages will be forced to consider seriously the elimination of a school-sponsored newspaper. While the school may recognize the educational value of including such a newspaper as part of

its journalism curriculum, economic costs may outweigh those benefits.

This is especially true in light of the fact that many local school districts are having increasing difficulty in obtaining liability insurance coverage, and the cost of the coverage that is available has increased by enormous proportions. Indeed it is not unusual for a school district to pay more for liability insurance than it pays for textbooks.

Assuredly, the Eighth Circuit's holding, if allowed to stand, would significantly increase the difficulty already faced by school districts in obtaining coverage. Because it exposes school districts to liability from several angles, companies already leary of providing insurance coverage to school districts will have more incentive to deny

coverage completely or else raise premiums above their already outrageously high level.

- B. A school may regulate student expression in a school-sponsored newspaper in order to carry out its duty to protect the privacy rights of other students and parents.

Some lower courts have recognized that speech, which the courts might otherwise have concluded was protected, nevertheless could be suppressed because it interfered with the privacy rights of the students. For example, in Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977), the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey

might invade the privacy of younger students, who might not be mature enough to handle the story's intimate information. The school's action was upheld even in absence of a showing of substantial and material disruption of the educational process. The decision made by the school officials here was based on similar grounds.

The parents of the students in the school also have the right to expect that the school will not sponsor publications which implicate serious privacy issues, such as pregnancy and divorce, without assuring that the information is educationally valid and portrayed in a manner that respects the legitimate concerns of others. In particular, the parents who were the subject of the divorce article in this case would certainly have cause to complain if the

school to which they are required to send their children is sponsoring the distribution of information about their private lives.

Obviously, no newspaper can publish whatever it wishes without repercussions. Newspapers, whether published by private or public entities, must constantly be aware that publication of certain information may invite civil actions seeking damages for alleged libel or invasion of privacy.

Libel cases involve an asserted injury to reputation; in general, newspapers may defend against libel claims by showing that the facts stated are provably true or privileged. That the news report does not identify a person by name is not enough to defend against such claims successfully, especially where sufficient details are provided so that

readers can determine the subject's identity.

This Court has also recognized certain protections for the press in the area of libel when the reporting relates to public officials, public figures and public issues. See New York Times v. Sullivan, 376 U.S. 254 (1964); Associated Press v. Walker, 388 U.S. 130 (1967); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and Time, Inc. v. Firestone, 424 U.S. 448 (1976). However, if a court finds a libel plaintiff to be a private citizen, in some states that plaintiff could prevail on a claim for damages by showing that the press was merely negligent, rather than reckless, in its reporting.

Newspapers must also protect themselves against claims for invasion of

privacy. Plaintiffs alleging privacy violations may do so on the grounds that the newspaper has infringed on the right to be let alone, wrongfully appropriated their name or likeness, given unreasonable publicity to their private lives or created publicity that unreasonably places them in a false light. Courts confronted with such invasion of privacy claims will generally weigh the newsworthiness of the published material against the rights of the individual. In addition to considerations of newsworthiness, courts may also determine whether the "[r]evelation is so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency." Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir.) cert. denied, 311 U.S. 711 (1940). It is not clear that the truth of the reported

matter is a complete defense in all invasion of privacy cases. See, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 500 (Powell, J., concurring).

School-sponsored newspapers are as vulnerable to lawsuits for libel and invasion of privacy as privately owned newspapers. Plaintiffs in such cases will not likely bring suit against only the student journalist but will also name the school district sponsoring the newspaper as a defendant. In view of this, school districts should be allowed to take measures to protect themselves from suit.

The school administration owes a duty to the student journalists to attempt to make the newspaper project as close as possible to the real world of newspaper publishing. The reality of newspaper publishing includes making responsible decisions about what to print, in order to

avoid unnecessary lawsuits. Needless to say, no newspaper leaves such decisions to the reporter. To assume that these decisions are most appropriately left to the student journalists escapes all reason.

In addition to the duty of teaching journalism students responsible reporting, the schools also have a duty to the other students in the school, many as young as ninth grade, to assure that the school does not sponsor information inappropriate for students of that age.

IV. IN ABSENCE OF A FINDING OF A "DISCRIMINATORY" MOTIVATION, COURTS SHOULD REFRAIN FROM REVIEWING THE RATIONALE BEHIND SCHOOL DISTRICT CURRICULUM DECISIONS.

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...local

control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation and a healthy competition for education excellence." Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

This Court has held on several occasions that where educational policy is at issue, local priorities and standards should control. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Thus, each state and each local school board, acting for the school district, must determine of what the public education will consist.

The U.S. Congress too has voiced its commitment to local control over curriculum. The most recent expression of that commitment is contained in the Department of Education Organization Act,

20 U.S.C. § 3401. That act provides in Section 103:

(a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the State.

(b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, over any accrediting agency or association, or over the selection or content of

library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

Every state in the Union guarantees through its Constitution the right of every child to a free public education. In order to assure that the people in each community have the freedom to decide what type of education will be provided to their children, states have adopted a system which grants ultimate authority over public school management to elected lay school boards at the local level.

This management responsibility includes overseeing all school-sponsored activities. This Court has reaffirmed this responsibility:

Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school and

the determination of what manner of speech is inappropriate properly rests with the school board. Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159, 3161.

This Court has also noted the differences between the pedagogical models for higher education and elementary and secondary education. Historically, inculcation of values and "basic skills" are of primary importance at the K-12 level while a free exchange of differing ideas, a "marketplace of ideas" has been the tradition at the higher education level. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Parents would indeed have reason to complain if the state required their children to attend the public schools while denying responsibility for what students hear, read and are taught in the classroom and school-sponsored

educational activities.

In secondary schools, it is true, the idea of academic freedom may be balanced to a degree by the countervailing interest of states, acting through local school boards, to inculcate basic community values to students who may not be mature enough to deal with academic freedom as understood or practiced at the higher educational level. East Hartford Education Association v. Board of Education, 562 F.2d 838, 843 (2d Cir. 1977).

Parents, who are required by the state to entrust their children into the care of the public schools, have a right to assume that the community's moral and educational values are observed and reinforced by the schools. Where the educational tool of a school newspaper creates the Scylla of a student lawsuit and the Charybdis of the forfeiture of that parental trust - school boards may simply get out of the water altogether and discontinue school newspapers.

It is the distinct province of the schools, not the courts, to determine what should be officially distributed to students under the aegis of the schools, Fraser, supra. And, it is the province of the schools to develop and interpret guidelines for the content of the curriculum, including school newspapers. Courts should not substitute their own judgment for the judgment of school officials. See, e.g. Wood v. Strickland, 420 U.S. 308 (1973), holding that it is not the province of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion; Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982), reversing a lower court holding that the school boards unreasonably interpreted a rule against consuming alcoholic

beverages; and Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), holding that courts, in assuring that the requirements of the Education for All Handicapped Children Act are met, must take care to avoid imposing their view of preferable educational methods upon states.

Even the most avid defenders of the First Amendment understand the need for different rules in the context of the school. William Safire, commenting on^o the Fraser case in the New York Times on August 24, 1986 stated:

Although I am a no-law-means-no-law First Amendment freak, I think Burger and Brennan were right to assert the school's right to rule that priapic pretension is out of order in an assembly; it's okay to shut up kids in formal settings when you are not trying to shut down their opinions.

The school administration in this case, like the school board in Fraser, was not attempting to "shut down" the opinions of the students. This clearly was not a case where school officials attempted to suppress articles in unauthorized "underground" newspapers. In fact, the students in this case were not disciplined for distributing the articles on their own after the school administration removed them from the school newspaper.

By not disciplining the students for distributing the articles on their own, the school showed that its decision to delete the material was not a case of the State acting as a censor to suppress ideas with which it disagreed. The decision made by the school officials was an educational decision that the materials were inappropriate in a

school-sponsored publication because of the intimate private details set forth in the articles and the fact that the identity of young students was revealed. The soundness of that educational decision is not an issue for the courts.

Ignoring this Court's admonitions to give great deference to the judgment of school officials on educational matters, the Eighth Circuit overstepped adjudicatory bounds and reversed the school district's determination of appropriateness in favor of its own.

The court rebuffed the school district's argument that one of the article's treatment of teen pregnancy was inappropriate. In the lower court's view because teen pregnancy is a problem of which students in nearly every high school in the United State are aware, the "articles would not offend their

sensibilities." Appendix to Petition for Writ of Certiorari at A-13.

The lower court was correct in noting that teen pregnancy is a national problem. The problem has reached crisis proportions. (Of all births in the U.S. in 1982, 14.2% were to females under 20 years of age. 1.1 million teenagers became pregnant in 1981, most of them unintentionally. Center for Population Options The Facts: Teenage Sexuality, Pregnancy and Parenthood. One could cite statistics on the problem ad infinitum.) Because teen pregnancy poses such a serious problem and because students receive inaccurate, unreliable or irresponsible information from a variety of sources outside the schools, it is particularly important that the information they get from school-sponsored sources is accurate. It

would be irresponsible for a school administrator to allow a school-sponsored newspaper to appear to endorse irresponsible sexual behavior by students. In the instant case, the administration merely sought to assure that the subject matter was responsibly reported.

In a recent publication, Preventing Adolescent Pregnancy: What Schools Can Do, the Children's Defense Fund recommends that "schools should move toward timely and accurate presentation of information on sexuality. Parents and community groups need to be involved in the development and review of school-based curricula... Parents, teachers and community group leaders must be offered training in human sexuality."

Protecting the privacy interests of the students is also an educational

decision not a legal one. Adults who waive their privacy interests by revealing information to a private newspaper must live with whatever consequences result from their revelations. Certainly, many an adult has later wanted to retract statements made in an interview.

The school officials have the duty to protect students in the custody of the schools from such consequences. Students in a high school setting may not have the maturity to understand the potential adverse consequences that flow from making public the most intimate details of their lives.

To be sure, some high school age students may be mature enough to handle the public exposure of personal details about their lives. However, the school officials are in a better position than

the courts to make that determination.

Likewise, many of the students involved in the publication of school newspapers are undoubtedly articulate and thoughtful, but they need the maturity and experience of their teachers and administrators to guide them in making decisions. The responsibility of the school administration is different from that at the college level. Students at this age, however mature they may appear, need supervision and protective authority. The decision below establishing a "hands off" policy on school newspapers and giving students the final word on what is published, unduly restricts educators from meeting their duty to guide students. Ironically, under this rule the school administration has less authority than the student editor of the newspaper.

CONCLUSION

Undoubtedly, there are some school boards, principals or teachers who would disagree with the educational decisions which were made by the school administration in this case. School districts differ widely across the nation. For example, some offer life science courses with explicit discussions of human sexuality. Others opt to leave that discussion to the parents. But all school districts are very careful to bring parents into the process of making decisions as to how and what should be taught in sex education classes. Most also give parents the right to deny consent to their children receiving that education.

There is a growing trend to establish school newspapers as a part of the journalism course in order to give

students a real world model. The newspaper is much more effective as an educational tool than a mere classroom exercise. However, if teachers and school administrators are restrained by the First Amendment from exercising control over what is published, school newspapers may be discontinued -- an unfortunate result.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED
MAR 30 1987

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No. 86-836

in the
Supreme Court
of the
United States
October Term, 1986

Hazelwood School District, et al.,
Petitioners,

vs.

Cathy Kuhlmeier, et al.,
Respondents.

On Petition For Writ Of *Certiorari* To
The United States Court Of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND
BRIEF FOR THE
SCHOOL BOARD OF DADE COUNTY, FLORIDA
AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

1. Pursuant to Rule 36.3 and Rule 42 of the Rules
of this Court, the School Board of Dade County, Florida,

respectfully moves this Court for leave to file a brief *amicus curiae* in the above-captioned case.

2. The School Board of Dade County, Florida is a body corporate existing under the laws of the State of Florida, particularly Section 230.21, Florida Statutes. The School Board is the policy making body of the school district. The School Board consists of seven members whose duties and powers include, but are not limited to, the establishment, organization and operation of schools, including the establishment of courses of study and provision of adequate instructional aid.

3. The question presented in this case is a matter of continuing importance to the School Board. Because the School Board has established a policy of operating school newspapers as a part of the journalism curriculum, the School Board will be directly affected by this Court's resolution of the question of the scope of authority which school districts have over student publications which exist in the school setting. The School Board seeks leave to file the attached brief because the decision in this case will have an impact on school districts throughout the nation. Moreover, the School Board wants the Court in reaching its decision to get a view of what reality is for this school district regarding the operation of student publications.

4. For the reasons stated above, as well as those set forth in the attached brief *amicus curiae*, the School Board respectfully requests this opportunity to present its views to the Court and respectfully requests this Court to grant its motion for leave to file the accompanying brief *amicus curiae*.

Dated: Miami, Florida, March 30, 1987.

Respectfully submitted,

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BRIEF FOR THE
SCHOOL BOARD OF DADE COUNTY, FLORIDA
AS *AMICUS CURIAE*

CONSENT TO FILING

The School Board of Dade County, Florida submits
this brief *amicus curiae* in support of neither Petitioner

nor Respondents in the above case. Respondents have consented to the filing of this brief but Petitioners have not. The School Board has filed a motion for leave to submit the within brief.

INTEREST OF THE AMICUS CURIAE

The School District of Dade County, Florida (the "District") is organized under Section 4, Article IX, of the Constitution of the State of Florida (App-2) and Chapter 230, Florida Statutes. The District, which is coterminous with Dade County and includes the city of Miami and neighboring communities, is the fourth largest school system in the nation in terms of student enrollment. As of October, 1986, the District consisted of 257 schools, 244,734 students and 30,593 full and part time employees, including 13,356 teachers. Management, control, organization and administration of schools are independent of metropolitan and city governments.

The School Board of Dade County (the "School Board") is a body corporate existing under the laws of the State of Florida, particularly Section 230.21, Florida Statutes (App-3). The School Board is the policy-making body of the District. The School Board consists of seven members elected by county-wide vote for overlapping four-year terms. Under existing state statutes, the School Board's duties and powers include, but are not limited to, the acquisition, maintenance and disposition of school property within the District; the development and adoption of a school program for the District; the establishment, organization and operation of schools, including vocational and evening schools, programs for

gifted students and for students in residential care facilities; the appointment, compensation, promotion, suspension and dismissal of employees; the establishment of courses of study and the provision of adequate instructional aids; and the establishment of a system to transport students to school or school-related activities.

There is the need for clear policy on the application of the First Amendment to student publications in a school setting. School boards across the nation need guidance from this Court as to the extent of their authority in establishing and enforcing guidelines dealing with the rights of students to freedom of expression, particularly regarding student publications, in a school setting. Kay Beth Avery and Robert J. Simpson in a recent publication, *The Constitution and Student Publications: A Comprehensive Approach*, summarize the need as follows:

"The common denominator underlying these disputes is concern for school liability associated with student publications. Since litigation is expensive in time and money for both the parties involved and the public, school officials and students alike need clear criteria to help them judge the permissible limits of student expression in the student press."

Ill-conceived or badly administered regulations may, in the long run, cost more than actual monetary damages and attorney's fees. It is difficult to set appraisal values on good community relations, well-preserved order and

decorum of the school, faculty and student trust and respect, and support from a satisfied school board. How can one put a price tag on intangible treasures such as leadership and rapport?

Because the whole school and community suffer when serious misunderstandings arise, it is imperative that school administrators understand the implications of any regulations affecting student publications and that they establish policies designed to prevent constitutional challenges to the validity of those policies."

The interest of this District is to provide the Court with the perspective of a major public school district comprised of diverse ethnic, social, economic and geographic communities on the issue before the Court in this case. We believe that this perspective will assist the Court in reaching a reasonable accommodation in balancing the needs of the schools to create and maintain an orderly learning climate with the rights of students to freedom of press in a school setting.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue whether, consistent with the First Amendment, public school officials can censor a high school newspaper by deleting pages because they object to the content of articles on divorce and pregnancy.

This case involves a challenge to a school district's authority to censor material it determines will cause "a material and substantial disruption of school

activities". The School Board, in this District, has faced this problem on numerous occasions in the past and is likely to face it again in the future. Having recognized that the right of free expression is extended to students through judicial interpretations of the First Amendment to the Constitution of the United States, the School Board has struggled to balance students' rights with the duties and responsibilities of school officials. The outcome generally has depended on the factual predicates in each instance. As demonstrated below, we believe this School Board has struck a balance on these issues through the establishment and implementation of reasonable policies and guidelines on student conduct, discipline and free expression.

ARGUMENT

1. It is undeniable that students enjoy some protection in their exercise of freedom of expression by the First Amendment to the United States Constitution. The right of free press is extended to students in the public school setting through judicial interpretations of the First Amendment. As this Court has held:

"... The First Amendment guarantees to every student the right to possess, post, and distribute any form of literature that is not materially and substantially disruptive to the process of education in the school setting. This includes, but is not limited to, newspapers, papers, magazines, leaflets, and pamphlets." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

This Court also held that:

"... in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views," *Id.*, at 511.

However, these rights are not absolute and must be "applied in light of the special circumstances of the school environment", *id.*, at 506, because the school district has special interests in that context. Subsequent to the *Tinker* decision, this Court has rendered two other decisions on student free speech rights: *Board of Education v. Pico*, 457 U.S. 853 (1982) and *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986). Based on the Court's ruling in these cases, this District has charged its school officials with the authority and responsibility to see that students' free speech rights are exercised in a manner that is free from arbitrary censorship, compatible with responsible student behavior, and consistent with the needs of the institution.

2. By design, the public schools in this District serve prescribed and specified educational purposes. Such purposes are directly geared toward developing and promoting opportunities for academic excellence, which is best achieved in a learning climate where the rights and responsibilities of every individual are known, respected and upheld. In this regard, the School Board has established various policies, by adopting various Board Rules, to further the educational purposes of the District. Board Rule 6Gx13-1A-1.07, establishes that one of the school system's important roles is to provide effective avenues of student expression (App-4).

Broadly defined, this expression may take any of the forms by which individuals usually communicate. Accordingly, appropriate guidelines dealing with student expression, have been developed and are made available to all parents and students in order to insure conformance to the various rules on student expression so as to maintain the orderly operation of schools. Additionally, to further implement the educational purposes of the District, these rules are further augmented by the *Code of Student Conduct* and the *Procedures for Promoting and Maintaining a Safe Learning Environment*.

3. The School Board of this District has taken the position that the primary objective of the Dade County Public Schools is to develop each student's potential for learning and to foster positive interpersonal relationships. To accomplish these goals, it is necessary that the school environment be free of disruptions which interfere with teaching and learning activities. Accordingly, this District has developed the *Code of Student Conduct* ("Code") which is based on the rules governing student conduct and discipline adopted by the School Board. Included in the Code is an explanation of the rights and responsibilities of students with regard to student publications (App-5). The philosophical basis for the School Board's policy regarding student publications is set forth in the Code as follows:

The primary liberties in a student's life have to do with the process of inquiry and learning; of acquiring and imparting knowledge; and of exchanging ideas. This process requires that students have the right to express opinions; to take stands; and to support causes publicly or privately.

One of the important roles of the school is to provide effective avenues through which students may express themselves on a wide range of subjects. Official school publications, such as school newspapers, should reflect the policy and judgment of the student editors and should include viewpoints representative of the entire school community.

Students' free publication rights are coupled with corresponding responsibilities such as to refrain from publishing libelous and obscene material; to seek full information on topics; and to observe normal rules for responsible journalism. Furthermore, the Code sets forth that the exercise of these rights are subject to the school administrator's authority to suppress or recall literature or material which they can reasonably forecast will substantially disrupt the normal operation of the school. To minimize conflict, appropriate district guidelines on student publications have been developed regarding the extent of students' right to publish and the Administration's authority to control such publications.

Guideline #8: Student Publications, contained in the *Procedures for Promoting and Maintaining a Safe Learning Environment* ("Procedures") sets forth the procedures for handling both school sponsored and nonschool sponsored publications (App-7). Guideline #8 is designed to make students, advisers and school administrators aware of their responsibilities regarding the publication and distribution of printed matter on school grounds. Furthermore, Guideline #8 establishes what is considered to be unprotected speech which may be subject to legal and/or official school action. The

overall purpose of the Procedures, particularly with respect to Guideline #8, is to guide and promote orderly and productive student participation in all student publications.

4. Current School Board policies hold student editors throughout the District responsible for basically every aspect of student newspapers. School administrators are responsible, among other things, to advise students and to insure that they understand the consequences of their actions. The various School Board rules, policies and directives concerning student publications in this District, as well as joint participation in their development by students, parents and school officials, have had the net result of school administrators taking somewhat of a "laissez-faire" attitude toward student publications. The most significant observable result of this approach is that student newspaper staffs have accepted and understand the rights and responsibilities associated with the rights of a free press. For example, most student newspapers have established staff editorial policies and publication guidelines as well as editorial boards that review content and ultimately decide how an issue should be handled. This procedure generally prevents arbitrary and thoughtless reporting and seeks truth, objectivity and fairness.

Another result of this District's approach to student publications is that the various school newspapers here have dealt truthfully and responsibly with so-called controversial issues such as those presented in the instant case, free of censorship, and without disruption to schools or invasion of any individual's rights. In addition, other topics ranging from AIDS to rock

pornography and school-based health clinics dispensing contraceptives have been covered in school newspapers in a responsible and professional manner without incident. (Illustrative Articles at App-18, 19, 20).

Finally, this District's approach to student publications has produced school newspapers that have won national, state and local awards from such noted organizations as: *Columbia Scholastic Press Association*, *National Scholastic Press Association*, *Florida Scholastic Press Association* and *Quill & Scroll*.

CONCLUSION

School districts across the nation need further direction from this Court regarding the extent of their authority to control student publications in a school setting. Students also need direction from the Court on the scope of their rights under the First Amendment when exercised in a school setting. This District has addressed these problems and reached what we believe to be a reasonable and workable solution within the context of the current status of the law as set by this Court in the aforementioned cases.

We urge this Court to seek a solution in the instant case that would allow school districts to exercise control over student publications so as to maintain an orderly school environment for the benefit of all students, and at the same time provide an avenue that would allow students the greatest degree of freedom of expression possible under the circumstances. An approach that unreasonably restrains the interests of either the school

districts or students would serve to the detriment of the entire public school educational process.

Respectfully submitted,

FRANK A. HOWARD, JR. and
JOHNNY BROWN

*Attorneys for Amicus Curiae
School Board of Dade County,
Florida*

By: /s/ Frank A. Howard, Jr.
Frank A. Howard, Jr. and
Johnny Brown

Appendix

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CONSTITUTION OF STATE OF FLORIDA

Section 4, Article IX

SECTION 4. School districts; school boards.—

(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as provided by law.

(b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

FLORIDA STATUTES (1986)

230.21 School board to constitute a corporation.—

The governing body of each school district shall be a school board. Each school board is constituted a body corporate by the name of "The School Board of _____ County, Florida." In all suits against school boards, service of process shall be had on the chairman of the school board or, if he cannot be found, on the superintendent as executive officer of the school board or, in the absence of the chairman and the superintendent, on another member of the school board.

RULES OF THE SCHOOL BOARD OF DADE COUNTY, FLORIDA

6Gx13-1A-1.07

Communication with the Public

STUDENT EXPRESSION

One of the schools' important roles is to provide effective avenues for student expression. Broadly defined, this expression may take any of the forms by which individuals usually communicate. Specifically, these forms may include, but are not limited to, speeches, leaflets, newspapers, magazines, pamphlets, and emblems.

The right of free speech is extended to students through judicial interpretations of the First Amendment to the Constitution. As such, the principal is charged with the authority and responsibility to see that this right is exercised in a manner that is free from arbitrary censorship, compatible with responsible student behavior, and consistent with the needs of the institution.

Appropriate guidelines dealing with student expression, agreed upon by the administration and the students, should be available to all parents and students in order to insure appropriate conformance to this Board Rule.

DADE COUNTY PUBLIC SCHOOLS CODE OF STUDENT CONDUCT

Publications

Philosophical Basis:

The primary liberties in a student's life have to do with the process of inquiry and learning; of acquiring and imparting knowledge; and of exchanging ideas. This process requires that students have the right to express opinions; to take stands; and to support causes publicly or privately.

One of the important roles of the school is to provide effective avenues through which students may express themselves on a wide range of subjects. Official school publications, such as school newspapers, should reflect the policy and judgment of the student editors and should include viewpoints representative of the entire school community.

Rights:

- Students have the right to possess, post, and distribute any forms of literature that are not inherently disruptive to the school program, including but not limited to, newspapers, magazines, leaflets, and pamphlets.

- Students have the right to be free of censorship of their publications except within the framework of guidelines previously agreed upon by current students and administrators.

Responsibilities:

- Students have the responsibility to use only those bulletin boards or wall areas designated for use by students and student organizations, and must also accept responsibility for the effect that the posting, publication, or distribution of this literature might have on the normal activities of the school.

- Students have the responsibility to refrain from publishing libelous and obscene materials; to seek full information on the topics about which they write; and observe the normal rules for responsible journalism.

Principals may suppress or recall literature which they consider primarily commercial in nature of material which could endanger the orderly operation of the school.

PROCEDURES FOR PROMOTING AND MAINTAINING A SAFE LEARNING ENVIRONMENT

GUIDELINE #8: STUDENT PUBLICATIONS

CURRENT LAW AND PRACTICES

It is undeniable that students are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States: "Congress shall make no law . . . abridging the freedom of speech or of the press."

There are three classifications of speech which are prohibited by law or not protected by the First Amendment. Following publication, these types of materials may be subject to legal and/or official school action:

1. Material which is "obscene for minors."
2. Material which is defined as libelous, a false and unprivileged statement about a specific individual which injures the individual's reputation in the community.
3. Material which will cause "a material and substantial disruption of school activities."

NOTE: See Pages IV-25 through IV-27 for legal definitions of: *obscene as to minors*, *libel*, and *a material and substantial disruption of school activities*.

The Supreme Court ruled:

"... The First Amendment guarantees to every student the right to possess, post, and distribute any form of literature that is not 'materially and substantially' disruptive to the process of education in the school setting. This includes, but is not limited to, newspapers, papers, magazines, leaflets, and pamphlets."¹

Having applied the First Amendment to the state (and, thus, public schools), courts have struggled to balance students' rights with the duties and responsibilities of administrators. This is exemplified by one judge's observation:

"... Free expression is itself a vital part of the education process. But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments, the courts must give full credence to the role and purposes of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner."²

¹*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

²*Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), cert. denied, 398 U.S. 156 (1968).

PROCEDURES

A. School Sponsored Publications

1. Students who work on official student publications will:

- a. Rewrite material, as required by the faculty advisors, to improve sentence structure, grammar, spelling, and punctuation.
- b. Check and verify the accuracy of all facts and quotations.
- c. Provide space in the same issue of the newspaper, when feasible, for rebuttal comments and opinions in case of news articles, editorials, or letters to the editor concerning controversial issues.
- d. Determine the content of the student publication.
- e. Consult with legal resources—local and national—in any case where the legality of content is questioned.

2. Advisors to official school publications will:

- a. Serve primarily as teachers whose chief responsibility is to guide students to an understanding of the nature, the functions, and the ethics of a free press and of student publications; advisors will not act as censors.

- b. Encourage the staff toward editing an intelligent publication that presents a complete and unbiased report and that reflects accurate reporting and editorial opinion based upon verified facts.
 - c. Function as a liaison between officials and students to ensure full communication of administrative guidelines to:
 - (1) students—advising of their right to print without censorship or prior restraint; and
 - (2) school officials—advising the duty of the institution to allow full and vigorous freedom of expression.
 - d. Insure that guidelines for the staffing and operation of scholastic publications are developed in concert with the current publication's staff and furnished to administrators.
3. School administrators will:
- a. Communicate to the advisor and student editors any guidelines which may affect student publications.
 - b. Be aware of the most current court rulings as they relate to free expression.
 - c. Support the First Amendment rights of students and the efforts of publication's

advisors to guarantee those rights in their daily work with publications; communicate to other members of the school community the rights of student journalists to question, inquire, and express themselves through student publications.

- d. Consult with the Board attorney and/or other legal resources when an editor, advisor, and/or principal are in disagreement over the legality of content. Final decision regarding content should be solely based upon its legality.
- e. Not terminate, transfer, or remove a person from his/her advisorship for failure to exercise editorial control over the student publication or to otherwise suppress the rights of free expression of student journalists.
- f. Not impose academic disciplinary action upon students, except in cases involving violations of unprotected speech.

B. Non-School Sponsored Literature

1. Publication

- a. Students should have the right to publish on their own, to possess, and to distribute on school grounds non-school sponsored printed matter when it is consistent with

distribution policies of the school and the content is such that it will not create disruption in the conduct of school activities.

- b. Students publishing non-school sponsored material may not use the school's name when soliciting advertisers; those who do will be subject to the disciplinary action of the school.
- c. Students who publish such literature should be made aware of the legal responsibilities for libelous or obscene material.

2. Distribution

- a. Each school should establish reasonable regulations regarding the time, place, and manner of distribution of all student publications.
- b. Distribution should be conducted in a manner which does not interfere with the normal flow of traffic within the school and at exit doors.
- c. Distribution should be conducted in a manner so as to prevent undue levels of noise which interfere with normal classroom activities.
- d. Students distributing literature should not interfere with the rights of others to accept or reject such literature.

- e. Students who distribute non-school sponsored material are responsible for the removal of the created litter or for the cost of having such litter removed.
- f. There should be no other regulation of the distribution process except—as with other modes of expression—where such activity directly causes, or is clearly likely to cause, physical harm or the substantial and material disruption of the educational process.

C. Bulletin Boards

- 1. Ample bulletin board space should be provided for the use of students and student organizations, including an area for notices relating to out-of-school activities or matters of general interest to students.
- 2. Regulations should require that notices or other communications be dated before posting and that such material be removed after a prescribed reasonable time to assure full access to bulletin boards.
- 3. School authorities may restrict the use of certain bulletin boards to official school announcements.

D. DEFINITIONS

Unprotected Speech

There are three classifications of speech which are prohibited by law or not protected by the First Amendment. Following publication, these types of materials may be subject to legal and/or official school action.

1. The first classification is material which is "obscene as to minors." Obscene as to minors is defined as:
 - a. The average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex.
 - b. The publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals.
 - c. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
 - d. "Minor" means any person under the age of eighteen.
2. The second classification is libel, material which is defined as a false and unprivileged statement

about a specific individual which injures the individual's reputation in the community. If the allegedly libeled individual is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice," i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth—without trying to verify the truthfulness of the statement.

- a. A public official is a person who holds an elected or appointed public office.
- b. A public figure is a person who either seeks the public's attention or is well known because of his/her achievements.
- c. School employees are to be considered public officials or public figures in articles concerning their school-related activities.
- d. When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willingly or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.
- e. Under the "fair comment rule" a student is free to express an opinion on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials, and other school employees.

3. The third classification is material which will cause "a material and substantial disruption of school activities."

- a. Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott, sit-in, stand-in, walk-out, or other related form of activity. Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.
- b. In order for a student publication to be considered disruptive, there must exist specific facts upon which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.
- c. In determining whether a student publication is disruptive, consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar

material, past experience in the school in dealing with and supervising the students in the subject school, current events influencing student attitudes and behavior, and whether or not there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.

- d. School officials must act to protect the safety of advocates of unpopular viewpoints.

Coral Gables Sr. High School Highlights
Thursday, June 12, 1986

Future mothers soon face new responsibilities

By Susan Bragman
A new responsibility is being placed on the shoulders of pregnant teens in Coral Gables. Starting next month, pregnant teens will be required to attend a special school program designed to help them understand the responsibilities of parenthood.

Pregnant teens find help at special school

By Susan Bragman
A new responsibility is being placed on the shoulders of pregnant teens in Coral Gables. Starting next month, pregnant teens will be required to attend a special school program designed to help them understand the responsibilities of parenthood.

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Miami Palmetto Senior High Panther
December 16, 1986

Caught in the middle

by Patrice Sonberg

Today, every three out of five children will live with a single parent by the age of 18, and 50 to 60 percent of all marriages will end in divorce. These devastating statistics threaten to overwhelm the average child with more than he can handle. There are problems of custody, time sharing and re-marriage.

The divorce rate is higher in the United States than in any other country as divorce becomes more socially acceptable than ever. According to a recent USA Today article, many people expect more of marriage than earlier generations did, and are more easily disappointed. High paying jobs are open to women now, therefore, they are less dependent on men. Also, changes in divorce laws have made divorce easier to obtain. On a recent Donahue show one woman said, "We live in a throw away society. If we don't like a sweater we throw it away and get a new one, and if we don't like a marriage, we do the same."

Children are the tragedy of divorce, and in more than half of the divorces, the couple has children under the age of 18. Judith Wallerstein, executive director of the Center for the Family in Transition, did a ten year study on the impact of divorce. 37 percent of the 130 middle-class children were more emotionally troubled five years after the divorce than they were initially. Wallerstein also says that fear of divorce affects their own love lives later. (But, many experts believe that living with one parent is less

harmful than living with both in an unhappy environment.)

In the early to mid-1900's, judges almost automatically granted custody of the children to the mother. But recently, joint custody has become more and more common.

Even though the court or family decides how the time with each parent will be split up, the holiday season in particular poses a major question— which parent do I spend it with? Many children have come up with their own solutions. Sophomore Tracy Lepore, whose parents have been divorced since she was seven said, "I switch off from year to year—one year I'm with my Mom, the next I'm with my Dad."

According to the U.S. News & World Report, the remarriage of a divorced parent often adds to a child's problems because it shatters his or her hope for reconciliation. The Stepfamily Association of America says that approximately 1300 stepfamilies are formed every day. Unfortunately, single parent homes aren't much better because a child is often expected to take the place of a spouse by doing extra chores, and looking after younger siblings. Senior Karen Reed comes from a divorced family, and both of her parents remarried.

"There's no restrictions as to which family I stay with. It's a flexible schedule, and I usually spend an equal amount of time with each. It works well because I have a good relationship with my parents, step-parents, and step-brother," she said.

North Miami Beach Senior High Quest
Monday, October 27, 1986

Former student loses battle with AIDS

FAHIA SERIES

Lance Gregory, a graduate of NMBSH's class of '86, was a National Merit Scholar-ship winner and a math and computer whiz. He ranked 14th in a class of over 700 students, had an "A" average and received a full scholarship to Florida International University.

But in southern Canada and finally, Gregory was a boy who will be remembered more for his personal achievements - his kindness, determination and quiet courage.

Gregory, a homosexual, died last month of an untreatable infection his body could not fight. In February, he was diagnosed as having LY III antibodies, the virus that causes AIDS, and in July those antibodies apparently became active.

Davidson, a former student, who had Gregory as a student for three years, said that despite his achievements, Gregory was "a regular guy. You are the best of our accomplishments, you are the GPA, but when you get right down to it, he was the guy who played music in the band and went on trips like everybody else."

Gregory played in the marching band throughout high school, but during his senior year he played the xylophone on the school's band. His condition prevented him from marching.

Davidson said Gregory didn't mind that at all. "He could have said, 'I can't march, so forget it,' but instead he found ways to be active," said Davidson. Being active in school was an idea Gregory took seriously; in addition to taking challenging classes and AP courses, he was involved in the school's math team and other clubs.

Hebe Thamel, math teacher and advisor for the Alpha Theta, said Gregory showed a genuine interest in learning and he was one of the few students who took her suggestions to do deeper research for her class.

Emily Bennett, a friend and fellow graduate of Gregory's, said, "He was so willing to work and to help, so much easier in his grade than anyone else I knew."

Gregory did have definite goals; he wanted to become a doctor. But Bennett said Gregory didn't want to study medicine "just to make a lot of money." He stood, after school, by waiting to help others, probably by following in the footsteps of his parents, who worked as machinists.

Gregory was "a really person with a good sense of humor," said Bennett. "It was comforting just to have him around. He was able to see the lighter side of things." Bennett said Gregory kept an optimistic outlook despite his health problem.

He completed an unharmed condition, delivered even after birth, in which

one of the band's chesting baritone, better right, is missing. As a result, homosexuals are given to heavy drinking, and only occasionally but in quiet and tears. About problems are common, such as in Gregory's case, homosexuals often have trouble making the long periods of time.

For homosexual, homosexuals receive a special kind of blood transfusion that involves separating the blood into the various components and then giving the patient only the lower right portion of the blood.

After Anna, America's Clinical Psychologist at the University of Miami advised that, said that alone several hundred units of different blood are needed to sustain a sufficient amount of factor eight, because are great that a homosexual receiving transfusions will be required to any type of virus, including AIDS. However, this has not been the virus in active or greatly sensitive blood as AIDS. Anna said this happens in 70 to 80 percent of all homosexuals receiving factor eight through transfusions.

Gregory's mother, Susan said that her son's LY III antibodies were diagnosed to be active in July. However, she said that in June she was certain even before the virus when her son was first exposed to the virus.

Davidson said Gregory was quiet, unassuming. "He was the type of person that if he was in a large crowd you might not notice him, but if he weren't there, you'd miss him," said Davidson. He said also that Gregory was so quiet about his homosexuality as he was about other things. "He didn't conceal it from anybody," said Davidson, "but he didn't make an issue of it so no one else did."

Gregory was required to tell about his condition on insurance forms for the many. David tries to vent on, but beyond that, he told few others.

David said also never heard Gregory complain. "He always had a pleasant look on his face. Someone else might have constantly asked, 'Why can't he tell me?' but not Lance. He didn't want to be labeled or persecuted."

Susan Gregory related an incident showing her son's similar attitude about his life and his capabilities. When Gregory was young and his mother was teaching him one word, the two came upon the word "handicapped."

When Gregory asked his mother about the word's meaning, she explained that a handicapped person is someone who is unable to do certain things. She used a blind man and a person in a wheel chair as examples. Then she told her son that, in a way, he was handicapped because of the things he couldn't do. Gregory didn't accept this proposition. "The just looked at me with this disgusted look and said, 'That's not true. There are some things I can't do, but there are some I can do,'" said Susan.

Susan Marie Quinn, who met Gregory during a summer accelerated math course, said she has learned a valuable lesson from him.

"He is really about and just not given up anything," she said. "You have to make the most of every day, like Lance did."

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED

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No. 86-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

CATHY KUHLMEIER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF PEOPLE FOR THE AMERICAN WAY
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

1. Pursuant to Rule 36.3 and Rule 42 of the Rules of this Court, People For the American Way respectfully moves this Court for leave to file a brief *amicus curiae* in the above-captioned case.

2. People For the American Way is a non-partisan membership organization established in 1980 by religious, civic, and education leaders. Its purposes include, *inter alia*, educating the public about the vitality of our democratic tradition, as well as improving the educational climate by encouraging intellectual curiosity and personal responsibility. People For the American Way also sponsors a legal defense fund which has provided assistance to parents and school officials seeking to promote the establishment of legal precedents that could protect basic constitutional guarantees in the public schools.

3. The question presented in this case is a matter of great and continuing national importance. Based on the experience it has acquired in confronting this and similar issues throughout the country on behalf of its 250,000 members, People For the American Way believes that the accompanying brief presents arguments that will assist this Court in its review. To the best of Movant's knowledge, the positions advanced therein have not been presented previously by other parties or *amici curiae* in this proceeding.

4. For the reasons stated above, and those set out in the accompanying brief *amicus curiae*, People For the American Way respectfully requests this Court grant its motion for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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CONSENT OF THE PARTIES

Respondents have consented to the filing of this brief, but petitioners have not. A motion for leave to submit the within brief has been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

People For the American Way is a member-based, nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. People For the American Way was founded in 1980 by a group of religious, civic and education leaders devoted to our heritage of tolerance and pluralism; it now has 250,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of our democratic tradition and defend against attacks from those who would impose narrow sectarian constraints on our free society.

The members of People For the American Way are committed to public education and believe that children must fully comprehend and appreciate their legacy of freedom in order to preserve it for the generations to come. In particular, the organization believes that public schools can meet their goal of preparing students to enter the real world by fostering students' intellectual curiosity and personal responsibility regarding issues that affect their lives. The organization has played a leading role in the debates over excellence and values in public education.

People For the American Way works to achieve these goals in a variety of ways, including the national distribution of publications, maintaining a speakers bureau of experts on a variety of education issues, and organizing a national network of local groups that work to prevent censorship in the schools. The organization recently initiated a legal defense fund which has provided assistance to parents and school officials in promoting the establishment of legal precedents that would protect basic constitutional guarantees.

Because this case will have great impact on the free exchange of ideas and independent thinking in the public schools, People For the American Way respectfully submits this *amicus* brief to the Court.

SUMMARY OF ARGUMENT

The court of appeals properly concluded that the Hazelwood East *Spectrum* was held out by the school to be and actually functioned as a forum for the expression of student opinion, and that the public forum doctrine therefore limited the authority of school officials to censor the newspaper under the First Amendment. This conclusion is not inconsistent with the finding of the district court that *Spectrum* was also a part of the school's curriculum.

Whether or not the public forum doctrine is applicable to student newspapers, censorship of student articles cannot be justified merely by reference to the newspaper's curricular role. Instead, a court should examine the nature and setting of speech in a particular case to determine if censorship was truly necessitated by curricular concerns, or rather by a desire to shield other students from discussion of certain topics. This Court's precedents require school officials to

justify any suppression of non-obscene and non-libelous student speech by demonstrating a reasonable basis for predicting material and substantial disruption of the educational process or invasion of the rights of third parties. Since no such showing was made in this case, the court of appeals properly reversed the district court's decision sustaining the actions of the school officials.

The decision of the court of appeals accords with the longstanding commitment of this Court to preserving the "marketplace of ideas" in the public schools. Censorship of *Spectrum* violated the right of all Hazelwood East students to be exposed to a broad range of viewpoints and information on issues of crucial importance to their lives. The duty of school administrators to inculcate community values does not justify interference with speech between and among students. Rather, it imparts an obligation to respect the freedom of expression protected by the First Amendment.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS STRIKES THE CORRECT BALANCE BETWEEN THE FIRST AMENDMENT RIGHTS OF STUDENTS AND THE DISCIPLINARY AND CURRICULAR AUTHORITY OF SCHOOL OFFICIALS

Petitioners suggest that the decision of the court of appeals in this case stakes out a radical new position in the area of First Amendment rights of high school students. In truth, the decision is fully consistent with the prior holdings of this Court and with the mainstream of federal court jurisprudence interpreting the holding of *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969), that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Petitioners rely primarily on cases dealing with more difficult issues regarding assertions of student First Amendment rights in connection with the selection by school officials of textbooks, library books, and school plays, the regulation of obscene, libelous, or intrusive speech, and the control of speech—such as the lewd and

vulgar public comments by a student in *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986)—that threatens to undermine order and discipline in the school.

In contrast, this case concerns the most traditional and responsible mode of speech by students in schools: thoughtful discussion of important social issues in articles in the school newspaper. The clear majority rule in the federal courts is to apply the strictures of *Tinker* to official censorship of student-written newspapers, even when the publication is to some degree tied into the curriculum. In compliance with *Tinker*, the courts have accorded broad discretion to school officials in determining the scope and content of curriculum and in maintaining order and discipline in the school environment, intervening only in cases where, as here, administrators overstep their bounds and interfere unnecessarily with the free speech and free press rights of students.

A. The Court of Appeals Correctly Held That the Authority of School Officials to Censor the Hazelwood East Spectrum is Limited by the First Amendment

The court of appeals determined that the Hazelwood East Spectrum was held out by the school to be, and actually functioned as, a forum for student speech. This conclusion is correct and accords with the majority view in the federal courts, notwithstanding the finding by the district court that Spectrum also served a curricular role.

Petitioners seem to advocate a rigid and simplistic distinction between "curricular" newspapers, over which school officials are apparently to have unbridled discretion to impose content-based restrictions, and "noncurricular" publications, which alone would have the protection of *Tinker*. Their argument ignores the reality that in many high schools, the primary forum for the expression of student opinion is the "official" school newspaper, which will in most cases be funded and supervised to some degree by the school. To hold that such a publication is automatically outside the scope of the First Amendment, even if it is put forth by the school as a forum for the expression of student opinion and actually serves as such, would permit school officials to stifle expression even when their decisions are not grounded in their proper roles of determining

curriculum and maintaining discipline in the school. The mere invocation of "curriculum" should not preclude a more particularized analysis of how a publication actually functions.

The court of appeals was correct in holding that the practical function served by Spectrum as a conduit for student expression makes it a "public forum" subject to constitutional protection. Even if this Court were to conclude, however, that public forum analysis is inappropriate in the context of a school-sponsored newspaper, it should reject the radical rule suggested by petitioners providing "all or nothing" First Amendment protection based on the formalistic determination of whether a student newspaper is a "public forum" or part of the curriculum. Even in the absence of a public forum finding, the discretion of school officials to make content-based decisions to suppress student speech is subject to constitutional limitations.

1. The Court of Appeals Correctly Determined That School Officials Established Spectrum as a Forum For Student Speech

The power of government to control speech in a place that by long tradition or government invitation has become a public forum is sharply limited by the First Amendment. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The State through its actions may create a public forum even in a place where it would not otherwise be required to permit speech, and may create a "limited public forum" dedicated to use by certain groups, such as students. *Id.*; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

Most courts that have addressed the question have held that a high school student newspaper, even one that is in some measure part of the curriculum, is a public forum where it is intended to and in fact does operate as a medium for the expression of student opinion. See, e.g., *Gambino v. Fairfax County School Bd.*, 564 F.2d 157, 158 (4th Cir. 1977); *Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971); *Zucker v. Panitz*, 299 F. Supp. 102, 103-05 (S.D.N.Y. 1969). Cf. *Bazaar v. Fortune*, 476 F.2d 570, 575 (5th Cir.) (college magazine), *aff'd as modified on other grounds*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995

(1974). *Stanton v. Brunswick School Dep't*, 577 F. Supp. 1560, 1571 (D. Maine 1984)(high school yearbook quotation page).

At Hazelwood East, *Spectrum* was avowedly created as a forum for student speech. As the court of appeals observed, the newspaper's official statement of policy, approved by school officials, expressly provides that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment," and specifically recognizes that *Tinker* guarantees these rights to high school students. See 795 F.2d 1368, 1372 n.3. The statement also stresses that material appearing in *Spectrum* reflects the views of the student writers and editors rather than the administration or faculty of Hazelwood East. *Id.* In addition, as the court of appeals noted, official written policies of the school board prohibited school sponsored publications from restricting free expression of diverse viewpoints on important issues. *Id.* at 1373. It teaches an awful paradox to have these official pronouncements coupled with an asserted power of censorship.

The students of Hazelwood East accepted the school's offer and actually used *Spectrum* as a forum for free expression on a wide range of issues. The court concluded:

Spectrum was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Id. The court's conclusion is not inconsistent with the factual findings made by the district court with regard to *Spectrum*'s role in the Hazelwood East curriculum. A newspaper may be a forum for student speech and still serve a valuable educational function. A school newspaper that was simply compiled in class and then buried in the files without being disseminated would be a sterile exercise; it is a newspaper's role as a functioning forum for student opinion on controversial topics that makes it a powerful educational device. See *Zucker*, 299 F. Supp. at 103 & n.1. The court of appeals correctly reversed the holding of the district court that simply because *Spec-*

trum was also tied into the journalism curriculum, the newspaper had no role as a forum for student speech. 795 F.2d at 1373-74.

2. *Even Without Regard to "Public Forum" Analysis, Tinker Limits the Discretion of School Officials to Censor High School Student Newspapers*

An exclusive focus on public forum analysis, as urged by petitioners, may obscure more important inquiries in this case. Insisting that *Spectrum* must be rigidly characterized as either a public forum or a part of the curriculum, petitioners make the extraordinary argument that if it is *not* a public forum, student speech is entitled to virtually no First Amendment protection. This conclusion is supported by neither precedent nor logic.

The public forum doctrine has been most helpful in determining who may claim equal access to a particular place or medium, as when a student group seeks to use a meeting room made available for other groups, see *Widmar*, 454 U.S. at 265, or when an advertiser seeks to place a political advertisement in a school newspaper that has generally made such space available to others. See *San Diego Comm. Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist.*, 790 F.2d 1471, 1476-77 (9th Cir. 1986). Analogous questions that might arise in connection with the operation of the Hazelwood East *Spectrum* would be whether the newspaper's Letters to the Editor column or advertising pages are public forums for all students. Forum analysis is also relevant in determining whether speech activity is compatible with the purposes to which a particular place is devoted. See *Perry*, 460 U.S. at 46-49 & n.9.

The present case does not concern access to the forum in the classic sense. The question before the Court is not which group of students is to have access to the forum, nor indeed whether the forum itself is compatible with speech activity. The nature of a newspaper answers both of these questions: the speakers are to be the newspaper's student writers and editors,¹ and a newspaper, by

¹ The questions of who has authority to select or remove staff members and what constitutional limits are placed on these decisions are not before the Court.

definition, is a proper vehicle for expression. The students in this case do not demand the right to be admitted to the *Spectrum* staff; they already have been. Having been granted access to the forum, they seek merely to avoid content-based suppression of their speech.

The Court may conclude, therefore, that public forum analysis is not helpful in defining the issues in this case. That by no means leads to the conclusion that respondents are without constitutional protection. The *Tinker* standard—which permits suppression of speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” 393 U.S. at 513—applies whenever school officials seek to censor student speech. *Tinker* itself made no reference to the public forum concept, and the case has apparently been applied in every student press case, regardless of whether a public forum has been found. See, e.g., *Nicholson v. Board of Educ., Torrance Unified School Dist.*, 682 F.2d 858, 863 n.3 (9th Cir. 1982) (*Tinker* protects official school newspaper; no public forum analysis); *Reineke v. Cobb County School Dist.*, 484 F. Supp. 1252, 1256-57 (N.D. Ga. 1980)(same); *Frasca v. Andrews*, 463 F. Supp. 1043, 1049-51 (E.D.N.Y. 1979) (same). See also *Bayer v. Kinzler*, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) (*Tinker* would apply even if student newspaper were not public forum), *aff’d*, 515 F.2d 504 (2d Cir. 1975).

This Court’s most recent decision touching on the First Amendment rights of students, *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), also contains no public forum analysis. Instead, the Court focused on the lewd, vulgar, and disruptive nature of the speech delivered by a high school student at an official school assembly, concluding that punishment of the student was justified under *Tinker*’s exception for speech that “‘intrudes upon the work of the schools or the rights of other students.’” 106 S. Ct. at 3163 (quoting *Tinker*, 393 U.S. at 508). No Justice suggested that if the assembly were deemed a “public forum” no restrictions on expression would be permitted or that a finding of no public forum would make the protections of *Tinker* unavailable to high school students.

Instead of pigeon-holing *Spectrum* as “forum” or “curriculum”—when it undeniably embodies elements of both—a more flexible and realistic inquiry is called for. A court should focus upon the

nature, setting, and mode of speech in a particular case to determine whether, under the standards of *Tinker*, school officials acted properly to restrain or punish student speech. Under this approach, it would be relevant but not dispositive that student speech occurred in a setting implicating curricular and not just disciplinary concerns. The question would remain whether the decision to curtail student speech in a given situation was soundly rooted in the school’s curricular function or otherwise justified under *Tinker*.

When the duty of school officials to determine and implement curriculum is directly implicated, student speech rights may be sharply curtailed. “Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that ‘a time, place, and manner restriction may not be based upon either the content or subject matter of speech.’” *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring in the judgment)(citation omitted).

Similarly, a journalism teacher at Hazelwood East would have broad discretion to control disruptive conduct in the classroom, and to make truly pedagogic decisions regarding student work. For example, if the teacher had decided, during the preparation of the articles in question, that certain quotations should be verified, or that both sides of a particular issue should be acknowledged, such decisions would at least arguably have been “curricular” and immune from judicial second-guessing. These decisions would relate directly to teaching journalism, to the normal give and take between student and teacher, and would have little impact on the free speech rights of the students involved.

The last-minute deletion of two full pages of *Spectrum*, by contrast, bears none of the earmarks of a curricular decision. The articles in question had been written, edited, and set in type as part of the normal editorial process, with consultation and guidance from the journalism teacher, Mr. Stergos. Mr. Reynolds, the principal, then summarily suppressed them all, largely on the basis that the subject matter was “inappropriate.” In doing so, he was not engaged in the process of teaching journalism; he was deciding what sort of material should be available to the larger body of students in the

school. He was engaging in non-curricular censorship. In declaring broadly that Hazelwood East students should not read articles about teenage pregnancy and divorce in the school newspaper, Mr. Reynolds himself defined his decision as being oriented toward concerns other than the training of student journalists.

The decision to suppress articles on the eve of publication may or may not be justifiable on the basis of a principal's power to maintain discipline, prevent libel or obscenity, or protect the rights of other students—the standards of *Tinker*. But it surely is not, and was not in this case, a *pedagogic* decision to which a court must automatically defer. The limited inquiry required by *Tinker* under the First Amendment cannot be foreclosed by talismanic reference to “curriculum,” particularly when it is not at all clear that curricular concerns really governed the decision. The court of appeals properly rejected the legal conclusion of the district court that virtually no constitutional protection can exist for a school newspaper that serves a curricular function.

B. The Court of Appeals' Application of *Tinker* Is Consistent With the Mainstream of Federal Cases and Poses No Threat to the Autonomy of School Officials

In applying *Tinker* to the facts of the present case, the court of appeals reversed the district court's holding that *Spectrum* could be censored because school officials (1) believed that divorce and teenage pregnancy were “inappropriate” for treatment in the school newspaper, and (2) sought to protect nebulous non-legal rights of other students and their parents. 795 F.2d at 1374-77. This holding is consistent with the application of *Tinker* by other federal courts, and in no way interferes with the discretion of school officials to make important decisions relating to curriculum or discipline.

Tinker reflects a reasonable compromise between the First Amendment rights of high school students and the responsibility of educators to maintain discipline and manage curriculum. The Court there reaffirmed “the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” 393 U.S. at 507. *Tinker* does not require that school officials justify the

curtailment of student expression by demonstrating that a compelling state interest could not otherwise be served—the traditional test for content-based state regulation of speech. Instead, school officials need only show that they had a reasonable basis upon which to forecast that student speech would “substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 509.

Tinker has been carefully applied in federal cases involving the student press to preserve the important discretionary functions of educators. For example, it has been held that school officials need not wait until actual disruption has occurred before acting to curtail disruptive speech. *Quarterman v. Byrd*, 453 F.2d 54, 59 (4th Cir. 1971). Prior restraint, virtually never acceptable in the adult press, has been approved for the student press by many courts, at least on the condition that schools provide constitutionally adequate procedural safeguards. *See, e.g., Shanley v. Northeast Indep. School Dist., Bexar County, Tex.*, 462 F.2d 960, 969 (5th Cir. 1972); *Quarterman*, 453 F.2d at 59; *Eisner v. Stamford Board of Educ.*, 440 F.2d 803, 808 (2d Cir. 1971). *But see Fujishima v. Board of Educ.*, 460 F.2d 1355, 1358 (7th Cir. 1972). In addition to barring obscene or libelous speech, administrators may censor speech that is reasonably viewed as posing a substantial risk of physical violence in the school. *Frasca v. Andrews*, 463 F. Supp. 1043, 1051 (E.D.N.Y. 1979).

Courts applying *Tinker* have nevertheless heeded the Court's admonition that “undifferentiated fear or apprehension of disturbance” or the desire to avoid the “discomfort and unpleasantness” that may accompany unpopular speech cannot justify the suppression of student speakers. 393 U.S. at 508-09. Where a reasonable basis does not exist for the prediction of material and substantial disturbance, or where the procedures set up for prior review of student expression are impermissibly vague or overbroad, courts have properly overturned official censorship of student publications. *See, e.g., Shanley*, 462 F.2d at 974; *Eisner*, 440 F.2d at 810; *Riseman v. School Comm.*, 439 F.2d 148, 149 (1st Cir. 1971); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975). In addition, “the school board's burden

of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory." *Shanley*, 462 F.2d at 971. Speech may not be suppressed merely because it is viewed by school officials as "controversial" or "inappropriate." *See, e.g., id.* at 971-72; *Stanton v. Brunswick School Dep't*, 577 F. Supp. 1560, 1574 (D. Maine 1984).

The decision of the court of appeals in this case is fully consistent with this body of case law. Petitioners have never asserted that the publication of the censored articles would have resulted in substantial and material disruption of the school, and the record is devoid of any basis, other than administrative convenience, for completely suppressing two entire pages of *Spectrum* rather than delaying publication in order to deal precisely with the perceived problem by making supposedly necessary changes.² The court below held, further, that suppression of the articles could not be justified on the basis of "protecting the rights of others," since (1) the teenage subjects of the pregnancy article were quoted anonymously and voluntarily, (2) the identities of the parents discussed in the divorce article could not be discerned by persons previously unfamiliar with the revealed facts, and (3) no party could possibly assert tort liability against the school on the basis of anything contained in the articles. 795 F.2d at 1375-76.³

² The court of appeals also properly rejected the assertion that student speech may be suppressed in order to avoid the implication that the school somehow "endorses" the student's views. The censored articles presented a realistic picture of teenage pregnancy and divorce and could hardly be construed by a reasonable reader as an endorsement of teenage sexual promiscuity. In any event, the newspaper publishes a disclaimer expressly disavowing any endorsement by school officials of views expressed therein. *See* 795 F.2d at 1372 n.3.

³ In arguing for a more expansive definition of "invasion of the rights of others," petitioners rely mainly on *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), which held that school officials could prevent a high school magazine from conducting a written student survey on teenage sexuality. *Trachtman* is factually distinguishable from the present case since the Second Circuit's decision rested on the psychological harm that could be visited upon students "importuned" to answer a series of highly personal questions about their own sex lives. *Id.*

Finally, the court of appeals accurately perceived that underlying other rationalizations for the censorship of *Spectrum* was the conviction of Mr. Reynolds that divorce and teenage pregnancy are "per se" inappropriate for treatment in the school newspaper. The court correctly rejected this ground for control of student speech, noting that students are both aware of and concerned about these issues and that responsible coverage in the school newspaper would be unlikely to shock or offend anyone. 795 F.2d at 1374-75.

The case before this Court does not concern speech by students that is lewd, sensationalistic, or unruly; it does not involve a challenge to the authority of school officials to select textbooks or library books, to shape the curriculum, or to regulate conduct that provides reasonable grounds for forecasting disruption of the educational process. It relates instead to a most traditional, respectable, and non-disruptive form of communication by students: careful, factual discussion of important social issues in a newspaper article.

POINT II

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS ASSURING FREE ACCESS TO A DIVERSITY OF VIEWPOINTS AND INFORMATION IN THE COMMUNITY OF AMERICAN SCHOOLS

In addition to violating the First Amendment rights of respondents, the actions of the school officials in this case interfered with

at 519-20. Here, by contrast, school officials suppressed publication of completed articles that contained anonymous, voluntary quotations that offered no basis for predicting psychological harm to any student.

Even as limited, the decision in *Trachtman* has been severely criticized for "grossly distort[ing] the meaning of the invasion-of-rights test" by extending it beyond tortious conduct governed by clear standards. Note, *Administrative Regulation of the High School Press*, 83 Mich. L. Rev. 625, 640-41 (1984). *Trachtman* was decided over a vigorous dissent by Judge Mansfield, who objected to the court's "vague and nebulous" extension of *Tinker*'s language. 563 F.2d at 521 (dissenting opinion). Judge Mansfield also questioned the need to shield modern teenagers from discussions of sex, observing that the court had an outdated image of high school students as "fragile, budding egos flushed with the delicate rose of sexual naivety." *Id.* at 526.

access by other Hazelwood East students to the information and ideas contained in the censored articles.⁴ The decision of the court of appeals follows in the footsteps of this Court in refusing to allow the preferences and preconceptions of local officials to determine the range of knowledge and opinions available in the public school environment.

The assertion of petitioners that the decision below will interfere with the ability of school officials to inculcate basic values is totally without foundation. The important role of the secondary school in preparing students for participation in American society requires that they be taught not just skills and self-discipline, but a respect for our constitutional tradition. Central to that tradition is a tolerance for pluralism in outlooks and beliefs that can only be developed by exposure to a broad spectrum of information.

A. The Right to Receive Information Has Been Recognized as Necessary to Guarantee Access to the "Marketplace of Ideas"

The theory of the First Amendment is that democracy is strengthened and the cause of truth best served by permitting the full range of viewpoints, including the unpopular and the provocative, to vie for acceptance in the public arena. As Justice Holmes wrote nearly seventy years ago:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴ It is irrelevant that school officials did not punish the students who subsequently distributed photocopies of the suppressed articles. The actions of petitioners had the intent and effect of limiting the number of students who would see the material by keeping the articles, and indeed the entire subjects of divorce and teenage pregnancy, out of the school newspaper. The perseverance of the *Spectrum* writers does not make this any less a case of censorship.

This Court has repeatedly stated that free trade in ideas is especially to be cherished in our public schools.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted). Those principles of *Keyishian* were applied to the public high school setting in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 512 (1969).

Because the marketplace of ideas is important not just for the speaker but for all who would hear what the speaker has to say, this Court has repeatedly recognized, in a wide range of settings, a First Amendment right to receive information. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (right to receive mail from prison); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969) (right of public to have access to wide range of ideas and experiences through broadcasting); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (right to receive publications through the mail); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (right to receive distributed literature).

In sum, this Court has held that

the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach

Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (citations omitted).

The right to receive information has also been recognized as a necessary incident of the marketplace of ideas in the public schools. As the Court said in *Tinker*, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." 393 U.S. at 511. The right to receive information was expressly recognized by the plurality opinion in *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), which held that recognition of the right was necessary both to protect the rights of *senders*, and as "a necessary predicate to the recipient's meaningful exercise of his own rights to speech, press, and political freedom." *Id.* at 867 (emphasis in original).

[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

Id. at 868. Some members of the Court in *Pico* were unwilling to hold that the removal of books from a high school library constituted a violation of the right of students to receive information in the absence of censorship of a particular speaker. A majority nevertheless recognized that where there is a willing speaker and recipient, the state may not unreasonably suppress communication in the schools. *See id.* at 878-79 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 887 (Burger, C.J., dissenting).

In contrast to *Pico*, this case *does* involve interference between a willing speaker and a willing listener. Although only the putative speakers are before the Court, broader interests are at stake. In silencing respondents—student journalists who sought to address important social issues in the pages of *Spectrum*—petitioners placed an obstacle in the road to knowledge for members of the larger high school community, impermissibly "contracting the spectrum of available knowledge."

It is beside the point to argue, as petitioners have, that similar information may be available through the orthodox channels of classroom instruction. The invitation to go speak somewhere else is rarely an inspired response to First Amendment claims. When offered with regard to one of the most basic media, a newspaper, such

a response is unacceptable. Unless some valid barrier is shown, the students of Hazelwood East are entitled to be exposed in that newspaper to a wide range of views, including expression by fellow students, that will challenge them, provoke them, stimulate them—and help them to develop the judgment and independence to participate fully in our free and pluralistic society.

B. Recognition of the Right of High School Students to Be Exposed to Diverse Viewpoints Is Not Precluded By the "Inculcation" Role of School Officials

America's public schools play a crucial role in inculcating fundamental skills, knowledge, and values, and educators are accorded broad discretion in achieving that purpose. *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). Petitioners suggest that this principle—undeniable and honored by the court of appeals in this case—precludes recognition of the public high school as a setting for diverse expression. They suggest that their duty in this regard authorizes them to silence student speech on important issues that they view as "appropriate" only to be addressed through formal classroom instruction.

However, among the most important values that public educators are charged with instilling are respect for the rights of others and tolerance for diversity in public discourse—in short, the principles underlying the First Amendment. To teach these principles in the abstract but fail to honor them in the concrete renders them meaningless in the eyes of students; it certainly does not prepare students to participate vigorously in a democratic society. Censorship by a school board "hardly teaches children to respect the diversity of ideas that is fundamental to the American system." *Pico*, 457 U.S. at 880 (Blackmun, J., concurring in part and concurring in the judgment). "It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass." *Shanley v. Northeast Indep. School Dist., Bexar County, Tex.*, 462 F.2d 960, 972 (5th Cir. 1972).

As Justice Jackson wrote in *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943):

— The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young

for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

To be sure, the constitutional rights of students must be applied "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Courts must strike a balance that permits limitations on student speech necessitated by the school's "inculcation" role without destroying the free trade in ideas that this Court has repeatedly recognized as sacred in the community of American schools. As Justice Blackmun noted in his concurrence in *Pico*:

Concededly, a tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem here is a difficult one, not that the problem should be resolved by choosing one principle over another.

457 U.S. at 881-82 (opinion concurring in part and concurring in the judgment). This Court should reject again the suggestion that the role of high schools in instilling basic values is inconsistent with the rights of high school students to be exposed to a broad range of viewpoints and information; the Court should reject a bright-line rule that allocates to high schools only the task of inculcation while reserving the marketplace of ideas for the college campus. That a different balance between "free trade in ideas" and "inculcation" may in some cases have to be struck depending on the level of the students involved does not mean that free speech and free press rights attach only upon college enrollment.

To the contrary, that high school students are being prepared for the adult world calls for the fullest recognition of their First Amendment rights consistent with the necessities of order and discipline in the school. High school students are or soon will be eligible to vote, serve on juries, enter into contracts, and register for the draft. They face increasingly difficult choices relating to college attendance, careers, exposure to drugs, and interpersonal relationships. They are

either children in the process of becoming adults, or already young adults. In either case, they must be given the tools to participate in this free society. These tools include the ability not just to memorize historical events, but to reflect upon their significance; not just to learn vocabulary words, but to express ideas; not just to pass tests, but to participate in the world.

The issues addressed by the *Spectrum* articles censored by petitioners—teenage pregnancy and divorce—touch millions of students and their families. More to the point, they are issues about which many high school students must make informed personal decisions. The asserted necessity for the school to inculcate community values in classroom coverage of these and other subjects does not address the need of students for access to additional information and other viewpoints, including those of fellow students.

To suggest that some topics are so "important" that they can only be addressed in one forum with one officially sanctioned viewpoint stands the First Amendment on its head. And to suggest that topics like those in question here are too "sensitive" for students to read about in a school newspaper when many students must confront these issues in their daily lives is to deny reality.

In short, the responsibility of school officials to inculcate community values through curricular choices does not necessitate or permit regimentation of speech between and among students. Student-written articles appearing in a high school newspaper—even those produced in a journalism class—are not themselves "curriculum." In censoring these articles respondents did nothing to further their "inculcation" duty; they merely shut off access for many students to the views of their classmates—reducing the spectrum of available knowledge. As the Fifth Circuit has said: "[T]he purpose of education is to spread, not to stifle, ideas and views." *Shanley*, 462 F.2d at 972.

CONCLUSION

In this year of bicentennial celebration, the former Chief Justice has urged that the meaning of the Constitution be discussed in every classroom in America. If the Constitution is to remain a living document, rather than "parchment under glass," our young must understand that its guarantees apply in the real world. The decision of the court of appeals in this case stands for the proposition that the First Amendment is not a history lesson, but a rule to live by. It is no threat to the authority of petitioners to hold that they must live by it too.

The judgment of the court of appeals should be affirmed.

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May 1987

AMICUS CURIAE

BRIEF

MAY 26 1987

No. 86-836

JOSEPH F. SPANIOL, JR.
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IN THE
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Respondents.

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AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The Student Press Law Center ("SPLC") is a national, non-profit, incorporated, legal research, information and advocacy organization formed for the purpose of promoting and preserv-

ing the First Amendment rights of high school and college journalists. Since its founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on censorship of the student press from around the country, submitted numerous *amicus curiae* briefs and litigated two student press cases.

The Journalism Education Association ("JEA") is a national association of approximately 1,200 high school journalism teachers and student publications advisers. JEA reaffirms its position statement first adopted in 1974 upholding the free press rights of students and affirming the role of teachers and administrators as advisers and instructors of students in dealing with sensitive issues, not censors seeking to prevent the writing or publication of material that raises such issues.

The Columbia Scholastic Press Advisers Association ("CSPAA") is a national association of over 2,000 high school publications advisers and journalism teachers headquartered at Columbia University in New York City. CSPAA is a longstanding supporter of student press freedoms and its members believe that such freedoms are critical to the future of journalism education.

Quill and Scroll Society is the only international honorary society for high school journalists with chartered chapters in more than 12,850 high schools in all 50 states and abroad and annually admits more than 12,000 students for membership. Quill and Scroll Society encourages and rewards individual achievement in journalism and has taken an active part in raising the standards of scholastic journalism since 1926. The Society is strongly committed to support of student press rights and believes a free press must be inviolate if democracy is to survive.

The National Scholastic Press Association ("NSPA"), including its college division, the Associated Collegiate Press ("ACP"), is a non-profit, educational membership association founded in 1921. NSPA/ACP provides evaluation services, educational programs and learning materials for student publications throughout the country and believes in the First Amend-

ment rights of student journalists and the need for educational programs that teach those rights.

The Missouri Journalism Education Association ("MJE") is an association of approximately 145 high school journalism teachers and publication advisers from the state of Missouri, including five current advisers in the Hazelwood School District. MJE supports the free expression rights of student journalists and believes that such rights are an important part of journalism education.

The Journalism Association of Ohio Schools ("JAOS") is an association of high school journalism advisers that represents nearly 100 schools in the state of Ohio. JAOS has been a state and national leader in advocating free expression rights for students for more than 50 years.

The Southern Interscholastic Press Association ("SIPA") is a non-profit association of high school publications advisers and student journalists from 15 states in the southern United States that annually serves more than 240 high schools. Headquartered at the College of Journalism of the University of South Carolina, SIPA is concerned about the future of scholastic journalism and is strongly committed to student First Amendment rights.

The Garden State Scholastic Press Association ("GSSPA") is an association of publication advisers and journalism teachers from the state of New Jersey. GSSPA is in full support of First Amendment rights for those under the age of 18 and freedom of the student press as guaranteed by the Constitution of the United States.

College Media Advisers ("CMA") is a national organization of nearly 600 advisers of college student media. CMA has been a staunch supporter of the rights of students to a free press since its founding in 1954 and believes a curtailment of student press rights would do incalculable harm to the future of journalism education.

The Community College Journalism Association ("CCJA") is the only national professional organization exclusively for journalism educators and publications advisers at community and junior colleges and has more than 200 members. CCJA is an advocate for student press freedoms and is devoted to fighting against threats to those freedoms.

The Association for Education in Journalism and Mass Communication ("AEJMC") is a membership organization of approximately 2,000 educators in institutions of higher learning committed to raising the standards of teaching in journalism, developing closer relations with the mass communication community and professional associations, fostering research and defending and maintaining freedom of expression and communication. AEJMC recognizes the vital role played in the high schools in preparing consumers for intelligent media use as well as in laying the foundation, in interest and ability, for prospective students in its schools.

Amici's membership and constituency includes tens of thousands of high school journalism teachers and publications advisers who are involved daily with the issues that this case raises before the Court. As such, they are compelled to note that when petitioners presume to speak for high school journalism teachers and advisers, they speak inaccurately and without authority. *Amici* affirmatively reject the censorship control the Hazelwood School District requests and assure the Court that such censorship plays no role in the maintenance of order in our classrooms, but in fact makes impossible the teaching of journalism and is inimical to a quality educational environment. Moreover, all *amici*, as journalism educators, voice their alarm about the lessons that schools such as Hazelwood East High School, through their causal censorship, are teaching tomorrow's citizens about the importance of the First Amendment in our democracy.

Amici note that stories like those censored from *Spectrum* about teenage pregnancy and divorce are viewed by journalism

educators as the pinnacle of high school journalism. The 1987 American Newspaper Publishers Association/Quill and Scroll National Writing Contest award-winning story for in-depth reporting, which described a student's personal account of the rape of her sister, would never have been published if the reporter had been a student at Hazelwood East. Appendix A. *Amici* also note that over 75 percent of student publications at public high schools in this country are produced as part of a journalism class. These publications are in almost every instance the only outlet teenagers have for making their opinions, ideas and concerns known to their peers and the world. Were the Court to grant petitioners the relief they request, a great many voices would be lost. Teaching students journalism, including the legal and ethical responsibilities that accompany First Amendment rights, would be impossible. Dwindling interest among students in journalism study and the practice of journalism as a profession would soon follow. Disaffected young people with a growing indifference to the significance of constitutional guarantees would ultimately result.

Because of the impact this litigation will have on student journalism across the nation, *amici* have a strong interest in the outcome of this case.*

STATEMENT OF THE CASE

At the time of the events giving rise to this lawsuit, plaintiffs Cathy Kuhlmeier, Leslie Smart and Leanne Tippet were students in the Hazelwood East High School Journalism II class and were on the staff of *Spectrum*, the student newspaper at Hazelwood East. *Spectrum*, in the past and present, serves as a voice for the students at Hazelwood East, allowing them to raise in articles, editorials and letters to the editor issues that touch their lives inside and outside the school. Both written policies of

*The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

the school board and *Spectrum's* own pages noted that student expression would not be restricted in the student newspaper.

For the May 13, 1983, issue of *Spectrum*, staff members prepared a two-page spread of articles that focused on some of the problems teenagers face today. The articles focused on teenage pregnancy, teenage marriage, runaways and the effects of divorce on children, topics recognized as national crises for our nation's youth. Several students at Hazelwood East were interviewed or surveyed for these articles, making the issues covered more relevant and immediate to *Spectrum's* readers. All sources were informed in advance that their statements were being collected for use in *Spectrum*, and all gave their explicit consent to such use.

Pursuant to an unwritten policy at Hazelwood East, principal Robert Reynolds was given a copy of the galley proofs for the May 13 issue of *Spectrum* before they were returned with corrections to the printer. On May 11, 1983, without any notice to *Spectrum* staff members, Reynolds ordered adviser Howard Emerson to delete from the issue the two-page spread that contained the articles mentioned above. Reynolds later justified his decision by saying that the stories were "too sensitive" and "too mature" for the students at Hazelwood East. He said divorce, which affects the children of almost half of the marriages in the country,¹ was *per se* a subject "inappropriate" for a high school newspaper. Relying on Hazelwood school board policies, the Hazelwood School District superintendent and board of education approved the principal's censorship.

Plaintiffs brought this action asserting that their rights under the First Amendment to the United States Constitution had

¹ In recent months, psychologists have begun to publish research on the effects divorce and parental conflict have on children's grades, conduct and social competence in school. Rich, *Parental Fighting Hurts Even After Divorce; Effects of Conflict on Adolescents Studied*, The Washington Post, Nov. 12, 1986, at A8, col. 2. Over three years ago, student journalists at Hazelwood East sought to note and explain these same effects.

been violated and requesting declaratory relief and damages. The United States District Court for the Eastern District of Missouri, after trial without a jury, entered a judgment for the defendants. Plaintiffs appealed, and the United States Court of Appeals for the Eighth Circuit reversed the decision, finding *Spectrum* a public forum for student expression and holding that the school could not demonstrate that its censorship was necessary to avoid material and substantial interference with school work or discipline or an invasion of the rights of others. This Court granted appellees' petition for certiorari.

SUMMARY OF ARGUMENT

The Hazelwood School District created *Spectrum*, the student newspaper at Hazelwood East High School, as an outlet for the expression of students. Both through its explicit written policies and its practice of allowing students to determine the content of *Spectrum*, the school district demonstrated its intent to create an avenue for the expression of student viewpoints and news. As a result of this intent, as well as the nature of a student newspaper as an expressive activity, First Amendment protections for respondents must apply. Recognition of such protections in no way interferes with petitioners' ability to determine the curriculum of their journalism class.

Petitioners had the burden of proving their censorship justified. They could not do so. They were unable to demonstrate that their censorship of *Spectrum* was justified under the material and substantial disruption or invasion of the rights of others standard that this Court applies to censorship within a public high school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Petitioners censorship was a direct prior restraint of student expression. Such policies are presumptively invalid, and the school district presented no justification for its system. Rather the school district's prior restraint created a potential for its tort liability that would not otherwise have existed.

Petitioners policies under which they attempt to justify their censorship are unconstitutionally overbroad and vague and fail to provide necessary procedural due process.

ARGUMENT

I. RESPONDENTS, AS STAFF MEMBERS OF A SCHOOL-SPONSORED NEWSPAPER FOR THE EXPRESSION OF STUDENT VIEWS, ARE ENTITLED TO THE PROTECTIONS OF THE FIRST AMENDMENT.

As this court once so eloquently put it, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Petitioners nevertheless argue that public high school students who serve as reporters or editors for a school-sponsored student newspaper should be exempt from that precept.²

Every court since 1969 that has faced the question of student press rights, save the district court in this case, has found student journalism entitled to extensive First Amendment protection. More than the armbands at issue in *Tinker*, student newspapers are "pure speech."

The United States Court of Appeals for the Eighth Circuit, following other courts confronted with censorship of school-sponsored student newspapers,³ used the public forum doctrine

² *Amici* in support of petitioners cite a recent decision of this Court, which although initially seems applicable, is easily distinguished. Unlike *Bethel School District v. Fraser*, 106 S.Ct. 3159 (1986), the case at bar does not involve the subsequent punishment of "vulgar" or "indecent" oral speech or captive audience considerations.

³ See, e.g., *Stanton v. Brunswick School Department*, 577 F. Supp. 1560 (D.Me. 1984); *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977) *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969); *Panarella v. Birenbaum*, 37 A.D.2d 987, 327 N.Y.S.2d 755 (N.Y. App. Div. 1971), *aff'd*, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (N.Y. 1973). Other

as the basis of its analysis. Recognizing that the suppression of content by school authorities is in essence a denial of access to the pages of the student newspaper, these courts have relied on the analysis that has been applied to public auditoriums, *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and public university facilities, *Widmar v. Vincent*, 454 U.S. 263 (1981).

The public forum doctrine was developed to assure that once the state establishes a "forum" for public discourse or expression, it does not censor speech or speakers absent highly compelling circumstances. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, ___, 105 S. Ct. 3439, 3449 (1985). As such, the doctrine has a logical application to a school-sponsored student newspaper that is an avenue for the expression of student news and viewpoints.

In *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), this Court established three categories of forums under the public forum doctrine: 1) the quintessential public forum, 2) the limited public forum and 3) the nonpublic forum. *Id.* at 45-46. *Perry* and other rulings of this court indicate that a school-sponsored student newspaper such as *Spectrum* is a limited public forum.

A student newspaper is not a quintessential public forum as are streets and parks. *Amici* do not suggest that petitioners have opened *Spectrum* for unrestricted access by students and non-students alike. See *Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981). As the Court noted in *Perry*, a "public forum" may be created for a limited purpose such as use by certain groups. 460

cases have seemingly applied a forum analysis without specifically referring to it as such. See, e.g., *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Korn v. Elkins*, 317 F.Supp. 138 (D.Md. 1970); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D. Ala. 1967), *dismissed as moot sub. nom. Troy State v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

U.S. 37, 46 n. 7 (1985). Rather, petitioners have established the student newspaper for use by the limited public of student staff members as a place for their expressive activity.

Nor do *amici* suggest that the public forum doctrine is the only valid method for defining and protecting student free press rights. Other courts have relied on a pure free press analysis similar to that enumerated by this Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1984); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986); *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 504 (2d Cir. 1975). *Amici* note that *Tinker* involved no finding of a public forum. Nevertheless, the Court found student expression protected by the First Amendment and school censorship impermissible. However, public forum analysis, which was relied on by the court of appeals in this case, is sufficient for affirmance.

A. The School District's Policy and Practice Established *Spectrum* as an Outlet for Student Expression.

No property is more compatible with expressive activity than a newspaper. The creation of a student newspaper inherently implies a free discussion of news and opinion. More importantly, the fact findings of the district court indicate that *Spectrum*, like other student publications, was "conceived, established and operated as a conduit for student expression on a wide variety of topics." *Gambino v. Fairfax County School Board*, 429 F. Supp. 731, 735 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977). See also, Student Press Law Cener, Law of the Student Press 14-15 (1985).

Petitioners own policies clearly establish that they intended *Spectrum* to be a forum for student expression. In Board Policy 348.5 they said, "Students are entitled to express in writing their personal opinions." *Kuhlmeier v. Hazelwood School District*,

607 F. Supp. 1450, 1455 (E.D. Mo. 1985). Board Policy 348.51 provided, "School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Id.* In stark contrast to *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983), where the school district had a written contract explicitly stating the limitation on materials that could be distributed through its faculty mailboxes, the Hazelwood School District's policies encouraged unfettered student expression.

The practice at Hazelwood East also established *Spectrum* as an outlet for student expression. The fact that *Spectrum* was used as a supplement to the school's journalism curriculum does not negate the students' constitutionally protected activity. Although the faculty adviser oversaw many aspects of the newspaper's preparation and production, the fact findings of the district court and the testimony of the adviser at trial give no indication that he acted as anything other than adviser of *Spectrum*. Students were the actual editors of the newspaper. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1454 (E.D. Mo. 1985). *Spectrum* carried news items of interest to the Hazelwood East student body and the community. *Id.* at 1452. It covered many topics that could easily be described as controversial. *Id.* at 1453. *Spectrum* was clearly not just an exercise in student writing skills.

Not all stories produced by students in the journalism class were printed in *Spectrum*. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1452. Students not enrolled in the class could submit their material to the newspaper for possible inclusion. *Id.* at 1453. The grades of students in the journalism class were not affected by whether their stories were published. *Id.* at 1453. *Spectrum* was distributed to the school community and the public as a newspaper. *Id.* at 1452. Thus *Spectrum* clearly had an important function beyond that of the schools' journalism classes. It was not merely a course exercise that remained in the files of the journalism department.

The message of the school district's policies reaffirmed the experience of students who worked on the staff of the student newspaper at Hazelwood East: *Spectrum* was by intention and in fact a student newspaper for the presentation of student news, views and opinions.⁴

⁴The situation of *Spectrum* at Hazelwood East is comparable to other student publications that have been recognized as protected by the First Amendment. In *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969) the court rejected censorship of a student newspaper described by school officials as a curricular device "intended to inure primarily to the benefit of those who compile, edit and publish it." *Id.* at 103. Such a claim was without merit, the court said, noting that the newspaper was sold to the student body, included letters to the editor and ran stories on controversial topics. "[I]t is clear that the newspaper is more than a mere activity time and place sheet." *Id.* See also, *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (literary magazine produced with the advice of a college English department and connected to a course for credit found to be a public forum); *Gambino v. Fairfax County School Board*, 429 F.Supp. 731, 733 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977) (high school newspaper sold to the public on which some of the staff members were enrolled in a journalism class and received academic credit for work on the newspaper); *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D. Me. 1984) (high school yearbook that allowed students to include one short quote next to their photograph to be a *de facto* public forum). And in a factual situation difficult to distinguish from the one at Hazelwood East, the court in *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D. Ga. 1980), found the official high school student newspaper to be protected from censorship. There the student editors and staff were enrolled in a journalism class for which they received academic credit, and the teacher was newspaper adviser as well as instructor.

Thus numerous courts faced with factual situations nearly identical to that presented here have found the student publication to be a forum for student expression, not a vehicle existing at the sufferance of school administrators and under their total control.

B. Recognition of *Spectrum* as an Outlet for Student Expression Does Not Impair Petitioners' Power to Determine Curriculum.

Petitioners would have this Court believe that a failure to sanction their censorship denigrates the traditional control they have rightly been accorded over school curriculum. No such loss of curricular control will occur. Allowing high school students to include stories about teenage pregnancy and divorce in their student newspaper in no way interferes with what the school teaches in the classroom. The Hazelwood School District retains the right to decide what textbooks will be used in the journalism class. The classroom teacher can still choose his lessons and direct class discussion. The school has no obligation to make *Spectrum* a text or required reading for any student in any class. The exercise of student press rights creates no intrusion to the daily operation of the school. As classroom teachers of journalism, many of whom advise student publications, *amici* note that such press freedoms only enhance the educational process. In such an environment students learn that decisions about the publication of sensitive material are not to be made lightly. They learn that accountability both under the law and from their readers accompanies the exercise of freedom. A student that knows from experience a free press learns corresponding responsibilities.

II. PETITIONERS' CENSORSHIP OF *SPECTRUM* DID NOT SATISFY THE *TINKER* STANDARD.

Over 18 years ago, this Court set the standard for defining the state interest that would justify curtailment of student expression in a public high school. Only when the student expression in question "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" may the school interfere. *Tinker v. Des Moines Independent Community*

School District, 393 U.S. 503, 513 (1969).⁵ As the Court noted in *Tinker*, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. See, Student Press Law Center, *Law of the Student Press* 24-25 (1985).

Petitioners offer no evidence that the articles removed from *Spectrum* would have disrupted classes. Nor can they substantiate any reasonable forecast of an unwarranted invasion of privacy as a result of the stories in question.⁶ As the Court of Appeals noted, consent of all those interviewed was obtained by *Spectrum* staffers. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1376 (8th Cir. 1986). As the Restatement (Second) of Torts, section 892A (1982), notes, a minor's consent is effective if he is capable of appreciating the nature, extent and probable consequences of the conduct to which he consents, even if parental consent is not obtained or expressly refused. Although the petitioners presented witnesses at trial who claimed they could identify the students interviewed for the pregnan-

⁵ Once the state has created a limited public forum, its ability to impose constraints on expression in that forum is significantly restricted. "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 46 (1984) (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)).

⁶ As the court of appeals noted, to define *Tinker*'s "invasion of the rights of others" so that it allows censorship of material that is not materially and substantially disruptive or a tortious invasion of privacy is specious. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1376 (8th Cir. 1986). Such a standard would give a school unlimited control and would contradict what this Court contemplated when it coined the "invasion of the rights of others" language. *Tinker*, 392 U.S. 503, 740 (citing *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) (students who wore freedom buttons invaded the rights of other students by harassing them for not wearing buttons or forcing buttons on them)).

In addition, a school district that does not censor need not fear liability for the student newspaper's torts. See section III(D), *infra*.

cy story, they presented no evidence that any of those students lacked the ability to understand the effect of their consent. Significantly, none of the students have raised a complaint about the stories, which were subsequently published in their entirety in a regional newspaper. *Too hot for Hazelwood*, St. Louis Globe Democrat, Feb. 9, 1985 (Weekend Section), at 5. There would be serious First Amendment implications in giving the state the authority to effectively cut off a minor's access to the media that offer to carry her message.

Petitioners can no more paint their censorship of stories about teenage pregnancy and divorce as content neutral than could the school district in *Tinker*. The Des Moines school board had enacted a rule, seemingly neutral on its face, that banned the wearing of armbands in school, no matter what their color or message. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969). Although the restriction was clearly directed at suppressing controversy concerning Vietnam, this Court found no evidence that the school board approved of United States involvement in southeast Asia and thus wanted to prohibit students from voicing a contrary opinion. *Id.* at 510 n. 4. Nevertheless, it held a ban on engaging in controversial but non-disruptive expressive activity unconstitutional. Much as the school district in *Tinker* felt that "the schools are no place" for discussion of controversial issues, *Id.* at 509 n. 3, so the Hazelwood School District was motivated by discomfort over the discussion of teenage pregnancy and divorce. A blanket prohibition of such controversial topics threatens "a value at the very core of the First Amendment." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 (1980) (Stevens, J., concurring).

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic." *Id.*, 447 U.S. 530, 537 (1980) (majority opinion). Giving the state the power to set the agenda, and thus limit the issues for debate, can significantly encourage some views while suppressing others.

See *Mission Trace Investments, Ltd. v. Small Business Administration*, 622 F. Supp. 687, 698 (D. Colo. 1985).

Moreover, petitioners' suggestion that their censoring actions involved no viewpoint suppression is disingenuous. Their own brief contradicts that assertion and demonstrates the crux of their decision to censor.⁷ In discussing the problem of teenage pregnancy and relating the issue to their readers, *Spectrum* staffers used the anonymous accounts of three pregnant teenagers at Hazelwood East. It was that fact, the "sexual norm" of those three students as petitioners refer to it, that provides the underlying basis of the school's decision to censor. See Petitioners brief at 34.

Undoubtedly, public school districts must maintain significant control over the education of students in their care. But "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education v. Pico*, 457 U.S. 853, 864 (1982).

III. THE HAZELWOOD SCHOOL DISTRICT'S CENSORSHIP AS A PRIOR RESTRAINT IS AN UNCONSTITUTIONAL INFRINGEMENT OF FIRST AMENDMENT RIGHTS.

A. Prior restraints are presumptively unconstitutional.

The freedom of expression clauses in the First Amendment were incorporated into the Constitution as a reaction to the censorship and licensing laws that had once dominated the English press. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 651-652 (1955). "[T]he main purpose of [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other

⁷ *Amicus Pacific Legal Foundation* has no hesitation in noting the viewpoints suppressed. *Pacific Legal Foundation* brief at 15.

governments.' " *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Indeed, prior restraints on speech and publication have long been recognized as the "most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

To protect against this infringement on the right to free expression, this Court has repeatedly held that any system of prior restraint comes with a heavy presumption against its constitutional validity. *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). In those situations where the Court has indicated prior restraints might be allowed,⁸ the Court has mandated that a crucial safeguard must be observed: judicial superintendence. Almost immediately after initiating a prior restraint, the censor must initiate an adversarial judicial determination as to the validity of the restraint. *Freedom v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books*, 372 U.S. at 70.

The Court was explicit in setting forth its rationale for this requirement. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. at 58. The prior restraint of *Spectrum* and the policy on which it was based provided for no such safeguard.

⁸ The Court has often noted that those situations where prior restraints would be permitted are quite rare and in fact are limited to "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). *Accord Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). According to *Near*, only three types of cases would be listed as exceptional: threats to the nation's military security, "obscene publications," and speech inciting violence and the forceful overthrow "of orderly government." *Id.* See also *Nebraska Press Association*, 427 U.S. at 590-93 (Brennan, J., concurring).

B. A Practice of Prior Restraint of Student Publications Creates an Intolerable Interference With Protected Expression.

To permit the practice of prior restraint in public high schools would be to ignore a fundamental fact that school officials themselves frequently recognize: "school censorship is immune from review except in the unusual circumstance that a student is willing and able to challenge it in court." Letwin, *Administrative Censorship of the Independent Student Press — Demise of the Double Standard?*, 28 S.C.L. Rev. 565, 581 (1977). School officials can hardly be expected to be immune from the natural inclination to suppress criticism or unpopular views. If prior restraint is allowed, inevitably they will be tempted to censor "with less self-restraint than if judicial review were a routine and inescapable precondition to a ban on distribution." *Id.*⁹

⁹ Even libelous material and unwarranted invasions of privacy (let alone substantially disruptive material) are not easily recognizable to laymen or the courts. Undoubtedly many a good-intentioned school official would reject much perfectly valid criticism and accurate reportage out of excess caution. *Cf.*, *Farmers Education & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (See section III(D) *infra*).

The fear of such temptation is not idle paranoia on the part of student journalists and advisers. Case after case has demonstrated that school officials routinely censor speech that is well within the bounds of First Amendment protection. See, e.g., *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977) (article censored that described existing methods of contraception); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (newspaper banned that described cheerleaders as "sex objects"); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (principal threatened students who distributed pamphlet criticizing school's prior restraint regulations); *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D. Ga. 1980) (newspaper confiscated that carried articles about the military draft and the energy crisis). Only the handful of students with the necessary financial resources, peer and parental support and sheer courage end up fighting unconstitutional censorship in court.

The Commission of Inquiry into High School Journalism convened by the Robert F. Kennedy Memorial established in 1974 that the problem of censorship is insidious and enduring. The Commission's public hearings, surveys and research caused it to conclude that "[e]ven [school] officials who are well aware of court decisions supporting a free high school press are prone to either ignore the court-approved standards for guidelines or apply them in such a way as to censor the paper." *Captive Voices, The Report of the Commission of Inquiry into High School Journalism* 42 (J. Nelson ed. 1974). The evidence overwhelmingly indicated that censorship by school officials focused on material dealing with controversial political issues, criticism of school employees or school policies and life styles and social problems such as birth control and drug abuse, all clearly protected speech. *Id.* at 41. Such findings as well as the growing number of requests for legal advice and assistance the Student Press Law Center receives each year, which reached 551 in 1986, do not bode well for a student that must live under a system of prior restraint.

Coerced self-censorship is the certain result of such unchecked authority. The chill of prior restraint, understandable in any situation, is only magnified by the relative powerlessness of high school students in relation to their administrators. Such self-censorship, with an accompanying cynicism about First Amendment guarantees, is the recognized result of years of unconstitutional school censorship. *Id.* at 48.

C. The Hazelwood School District Has Presented No Evidence To Support the Necessity Of Its Practice of Prior Restraint.

Presumably, a public school district that exercises prior restraint would suggest that such a practice is necessary for avoiding material disruptions and maintaining a level of quality education for its students. The Hazelwood School District apparently presumes such control is necessary without presenting

any evidence to indicate that such is the case. Can school officials be allowed to rely on the same "undifferentiated fear" that this Court has handily discounted? *Tinker*, 393 U.S. at 508.

The Court must weigh the likelihood of a "material and substantial disruption or invasion of the rights of others" resulting from the stories included in a student newspaper. It then must balance that weight against the potential for abuse in a system of prior restraint and our country's long antipathy toward such a practice. *Amici* are aware of only one case decided in the 18 years since *Tinker* where school officials were able to convince a court (incorrectly, *amici* believe) that a material and substantial disruption in fact would have occurred if censored material had been published in a school-sponsored student newspaper.¹⁰ In *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979), the court held that an editorial reference in the student newspaper to "hotheaded, egotistical, 'Pissed Off' jocks" could have resulted in a physical disruption based on the unsupported opinion of the building principal who was the censor, the coach of the athletes referred to and an English teacher. *Id.* at 1051. Furthermore, the court found that a reference to the unfitness and educational dishonesty of a student government vice-president met the *Tinker* standard although it refused to allow the censored students to prove the truth of the statements in a hearing. *Id.* at 1052.

Were the fear of disruption well founded, common sense would indicate that high schools which do not exercise prior restraint authority, including those in states under the jurisdiction of the Seventh Circuit Court of Appeals, would be in

¹⁰ In *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978), the United States Court of Appeals for the Second Circuit held, over a persuasive dissent, that distribution of a student survey which solicited information regarding students' sexual practices met the *Tinker* standard for censorship. As such, the case did not involve material that a student newspaper was seeking to publish.

chaos. In *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), the Seventh Circuit held unconstitutional a school regulation providing for prior approval and restraint of student publications to be distributed on school grounds. Yet in the years since *Fujishima* there has been no suggestion that high school education in Illinois, Wisconsin and Indiana has suffered because of the limitation placed on school officials. The Seventh Circuit considered it sufficient that schools have the authority to subsequently punish students for activity that had created a material disruption. Moreover, it left the option open for school officials to seek injunctive relief when they anticipate that a situation warrants the extreme and immediate action of prior restraint. Yet no indication exists that even once in 15 years has a single school official in any of the three states taken advantage of this avenue.

In 1978, the Student Press Law Center developed a set of model guidelines for student publications that specifically prohibit prior review. See Appendix B. In the intervening nine years, school districts across the country, including Dade County, Florida, and Lakewood, Ohio, have used these guidelines as a starting point for adopting their own policy.¹¹

The logical conclusion from these facts, as well as those gleaned from high schools around the country, is simple: "Where a free, vigorous student press does exist, there is a healthy ferment of ideas and opinions, with no indication of disruption or negative side effects on the educational experience of the school." *Captive Voices*, *supra*, at 49. See also Student Press Law Center, *Law of the Student Press* 4, 56-57; Comment, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 De Paul L. Rev. 387, 419 (1979). Hazelwood School

¹¹ *Amicus* School Board of Dade County, Florida, gives its own testimony of how a system rejecting prior review can produce outstanding student publications in successful schools. The statement of the Lakewood, Ohio, school superintendent is included in the Appendix C.

District presented no evidence to indicate that its practice of prior restraint is necessary. Thus it must be rejected.

D. A School District that Avoids Prior Restraint Is Protected from Liability For a Student Publication's Torts.

Amici National School Boards Association and National Association of Secondary School Principals assume that public high schools will be responsible for the torts of their student newspapers because of the agency relationship between the two and justify the need for control based on that fear. See, W. Prosser, *Law of Torts* § 69 (4th ed. 1971). Given the fact that there is not one reported decision where a court has held a public high school financially responsible for tortious material published in a student publication, their fear appears to have little basis. But more importantly, the determination of whether or not such an agency relationship exists is based on a three-pronged analysis: 1) consent, 2) benefit and 3) right of control. Restatement (Second) of Agency § 1 (1957). Because the First Amendment prohibits control by public school officials, those that follow its dictates cannot be held financially liable for the torts of their student newspapers.

The Court has recognized precisely this principal in a slightly different context. In *Farmers Educational & Co-operative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), it held that broadcasting stations licensed by the Federal Communications Commission are barred from removing defamatory statements contained in speeches by candidates for public office. If such censorship were permissible, the Court said, "a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter." *Id.* at 530.

Once the legal inability to censor was recognized, the Court went on to grant the licensee immunity from liability. To do otherwise, the Court noted, would allow the "unconscionable

result" of permitting liability to be imposed for the very conduct the law demands. *Farmers Union*, 360 U.S. at 531. "Quite possibly, if a station were held responsible for the broadcast of libelous material [of political candidates], all remarks even faintly objectionable would be excluded out of an excess of caution." *Id.* at 530.

At least two courts have specifically applied this rationale to student newspapers at public schools. When the crucial control element is missing, that is, when a public school follows the constraints placed on it by the First Amendment and does not exercise content control of the student newspaper, the school is immune from liability. *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981). Thus the legal prohibition against prior restraint protects schools from financial liability for torts that constitutionally and educationally they are in no position to prevent.

IV. HAZELWOOD SCHOOL DISTRICT'S REGULATIONS AS APPLIED TO SPECTRUM STAFF MEMBERS ARE UNCONSTITUTIONALLY OVERBROAD AND VAGUE AND CONSTITUTE A DENIAL OF PROCEDURAL DUE PROCESS.

The Hazelwood School District sought to regulate the content of *Spectrum* through board policies 348.5 and 358.51 and the unwritten requirement that the principal approve all "controversial and sensitive materials" that are to appear in *Spectrum*. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1453-56. Both the district court and the court of appeals failed to conduct an initial evaluation of the constitutionality of these regulations. Unlike the disciplinary regulations at issue in *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), which were used only for subsequent punishment, the rules at Hazelwood East were used to restrict expression before publication. While sanctions applied to a student speaker subsequent to his speech will perhaps survive some vagueness and lack of specificity, *Id.* at 3166, a rule "subjecting the exercise of First Amendment

freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). Student speech, whether within or outside of a public forum, can only be limited when appropriate due process is afforded. *Gambino v. Fairfax County School Board*, 429 F. Supp. 7831, 737 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157, 1977; *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975).

"Invariably, the Court has felt obliged to condemn systems in which the exercise of such [prior restraint] authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious first amendment freedoms is too great where officials have unbridled discretion . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Precision must be the "touchstone" in such analysis. *NAACP v. Button*, 371 U.S. 415, 438 (1965). The First Amendment requires that speech restrictions be "narrowly drawn." *In re Primus*, 436 U.S. 412, 438 (1978). To escape a void-for-vagueness determination, the rules in question must be enumerated with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The regulations of the Hazelwood School District prohibit the publication of material that is libelous, defaming to character, obscene, a "personal attack[]," commercial, outside the rules of "responsible journalism," advocating racial or religious prejudice, or contributing to the interruption of the educational process. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1455-56 (E.D. Mo. 1985). None of these provisions suggest that stories concerning teenage pregnancy or the effects of divorce on children were impermissible.

Many lower federal courts have followed these guidelines and established that prior restraint regulations in high schools, if they are to exist at all, must meet certain minimal requirements.

Regulations must offer criteria and specific examples so that students will understand what expression is proscribed. *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345, 1349 (4th Cir. 1975); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 976 (5th Cir. 1972). They must detail the criteria by which an administrator might reasonably predict the occurrence of "substantial disruption." *Nitzberg*, 525 F.2d at 383. The regulations must provide definitions of all key terms used, such as "defamatory." *Hall v. Board of School Commissioners*, 681 F.2d 965, 971 (5th Cir. 1982), *Nitzberg*, 525 F.2d at 383, *Shanley*, 462 F.2d at 977. Students must be given the opportunity to know that such rules exist; the regulations must be included in the official school publications or circulated to students in the same manner as other official material. *Nitzberg*, 525 F.2d at 383.

~ These publication guidelines also must specify to whom the material is to be submitted for approval, *Eisner v. Stamford Board of Education*, 440 F.2d 803, 811 (2d Cir. 1971), and give the students the right to a prompt hearing before the decision-maker where they can argue why distribution should be allowed. *Leibner v. Sharbaugh*, 429 F. Supp. 744, 749 (E.D. Va. 1977).

Procedural due process also requires that publication guidelines limit the time in which the official has to reach a decision on whether to prevent distribution, provide for the contingency of an administrator failing to issue a decision within that reasonable time, and include an expeditious procedure for appealing that administrator's decision. *Baughman v. Freienmuth*, 478 F.2d at 1348, *Eisner v. Stamford Board of Education*, 440 F.2d at 810, *Quarterman v. Byrd*, 453 F.2d 54, 59 (4th Cir. 1971), *Hall v. Board of School Commissioners*, 681 F.2d at 969; *Shanley v. Northeast Independent School District*, 462 F.2d at 977; *Leibner v. Sharbaugh*, 429 F. Supp. at 749. As this Court has noted, "requiring effective notice and an informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action." *Goss*

v. *Lopez*, 419 U.S. 565, 583 (1975). Certainly the liberty interest a student has in free expression is no less significant than the property interest he has in a public education. *Spectrum* staffers were denied all of these procedures.

The regulations of the Hazelwood School District clearly fail to meet constitutional requirements. The danger inherent in the school's policy "shudders the conscience of those to whom the first amendment is sacred." *Shanley v. Northeast Independent School District*, 462 F.2d at 977. Under such a policy, the First Amendment can be "negated by benevolent, though perhaps misguided, satraps of our schools." *Id.* Thus the regulations and the actions based on them must be declared unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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May 26, 1987

APPENDIX B**SPLC MODEL GUIDELINES
FOR STUDENT PUBLICATIONS****I. STATEMENT OF POLICY**

It is undeniable that students are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States. Accordingly, it is the responsibility of school officials to insure the maximum freedom of expression to all students.

It is the policy of the _____ Board of Education that _____ (newspaper), _____ (yearbook), and _____ (literary magazine), official, school-sponsored publications of _____ High School have been established as forums for student expression. As a forum, each publication should provide a full opportunity for students to inquire, question and exchange ideas. Content should reflect all areas of student interest, including topics about which there may be dissent or controversy.

It is the policy of the _____ Board of Education that student journalists shall have the ultimate and absolute right to determine the content of official student publications.

II. OFFICIAL SCHOOL PUBLICATIONS**A. Responsibilities of Student Journalists**

Students who work on official student publications will:

1. Rewrite material, as required by the faculty advisers, to improve sentence structure, grammar, spelling and punctuation;
2. Check and verify all facts and verify the accuracy of all quotations;

3. In the case of editorials or letters to the editor concerning controversial issues, provide space for rebuttal comments and opinions;

4. Determine the content of the student publication.

B. Prohibited Material

1. Students cannot publish or distribute material which is "obscene as to minors". Obscene as to minors is defined as:

(a) the average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex; and

(b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals; and

(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Minor" means any person under the age of eighteen.

2. Students cannot publish or distribute material which is "libelous", defined as a false and unprivileged statement about a specific individual which injures the individual's reputation in the community. If the allegedly libeled individual is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice", i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth — without trying to verify the truthfulness of the statement.

(a) A public official is a person who holds an elected or appointed public office.

(b) A public figure is a person who either seeks the public's attention or is well known because of his achievements.

(c) School employees are to be considered public officials or public figures in articles concerning their school-related activities.

(d) When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.

(e) Under the "fair comment rule" a student is free to express an *opinion* on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials and other school employees.

3. Students cannot publish or distribute material which will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott; sit-in, stand-in, walk-out or other related form of activity. *Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.*

(b) In order for a student publication to be considered disruptive, there must exist specific facts upon

which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.

(c) In determining whether a student publication is disruptive, consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar material, past experience in the school in dealing with and supervising the students in the subject school, current events influencing student attitudes and behavior, and whether or not there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.

(d) School officials must act to protect the safety of advocates of unpopular viewpoints.

(e) "School activity" — means educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch periods.

C. Legal Advice

1. If, in the opinion of the student editor, student editorial staff or faculty adviser, material proposed for

publication may be "obscene", "libelous", or "cause a substantial disruption of school activities", the legal opinion of a practicing attorney should be sought. It is recommended that the services of the attorney for the local newspaper be used.

2. Legal fees charged in connection with this consultation will be paid by the board of education.

3. The final decision of whether the material is to be published will be left to the student editor or student editorial staff.

III. PROTECTED SPEECH

School officials cannot:

1. Ban the publication or distribution of birth control information in student publications;

2. Censor or punish the occasional use of vulgar or so-called "four-letter" words in student publications;

3. Prohibit criticism of school policies or practices;

4. Cut off funds to official student publications because of disagreement over editorial policy;

5. Ban speech which merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent lawless action;

6. Ban the publication or distribution of material written by nonstudents;

7. Prohibit the school newspaper from accepting advertising.

IV. NONSCHOOL-SPONSORED PUBLICATIONS

School officials may not ban the distribution of non-school sponsored publications on school grounds. However, students who violate any rule listed under II.B. may be disciplined after distribution.

1. School officials may regulate the time, place and manner of distribution.

(a) Nonschool-sponsored publications will have the same rights of distribution as official school publications.

(b) "Distribution" — means dissemination of a publication to students at a time and place of normal school activity, or immediately prior or subsequent thereto, by means of handing out free copies, selling or offering copies for sale, accepting donations for copies of the publication, or displaying the student publication in areas of the school which are generally frequented by students.

2. School officials cannot:

(a) Prohibit the distribution of anonymous literature or require that literature bear the name of the sponsoring organization or author;

(b) Ban the distribution of literature because it contains advertising;

(c) Ban the sale of literature.

V. ADVISER JOB SECURITY

No teacher who advises a student publication will be fired, transferred or removed from the advisership for failure to exercise editorial control over the student pub-

lication or to otherwise suppress the rights of free expression of student journalists.

VI. PRIOR RESTRAINT

No student publication, whether nonschool-sponsored or official, will be reviewed by school administrators prior to distribution.

VII. CIRCULATION

These guidelines will be included in the handbook on student rights and responsibilities and circulated to all students in attendance.

APPENDIX C

LOGO

LAKEWOOD BOARD OF EDUCATION**EXECUTIVE OFFICES**

1470 WARREN ROAD • LAKEWOOD, OHIO 44107

DANIEL M. KALISH
 Superintendent of Schools
 (216) 529-4092

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 Deputy Superintendent
 Administration
 (216) 529-4215

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 Curriculum/Instructional Services
 (216) 529-4094

March 23, 1987

Dear Student Press Law Center:

As Superintendent of Lakewood City Schools I would like to note, for the record, that the Lakewood Schools has never censored its student publication in the past.

We believe that journalism is best learned by helping students exercise the skills of responsible professional journalism. Along these lines we have developed a Journalism Course of Study which stresses these judgmental skills. We have not found it necessary to interfere in the decision-making process of our student newspaper. Our students have practiced what they have been taught about the responsibilities of good journalism and their constitutional guarantees.

We further believe that in hiring qualified and certified instructors as advisers we are helping to meet our obligation in ensuring that students understand and practice journalism ethics and are aware of legal responsibilities of publications.

Even though our publication may deal with topics readers believe are controversial, our students have done this under the guidelines of professional journalism.

Sincerely,

/s/ Daniel M. Kalish
 Daniel M. Kalish
 Superintendent of Schools

DMK:jom

AMICUS CURIAE

BRIEF

MOTION FILED
MAY 26 1987

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No. 86-836

IN THE
Supreme Court of the United States

October Term, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,
v.
CATHY KUHLMEIER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF AND MOTION OF AMERICAN SOCIETY OF
NEWSPAPER EDITORS, NATIONAL ASSOCIATION
OF BROADCASTERS, REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND SIGMA DELTA CHI,
AMICI CURIAE, IN SUPPORT OF AFFIRMANCE**

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MOTION OF AMERICAN SOCIETY OF
NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF
BROADCASTERS, REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND SIGMA DELTA CHI,
AMICI CURIAE BRIEF

Consent to the filing of this brief has been secured from counsel for the respondent but denied by counsel for the petitioners. Accordingly, we submit this motion for leave to file the brief submitted with it.

The *amici* represent the interests of private journalism. We recognize that the First Amendment safeguards applicable to members of the *amici* organizations are different than those governing the outcome of this case. Student newspapers sponsored by public educational institutions present special constitutional considerations. The general interest of *amici* in securing First Amendment protection for journalism and the particular importance attached by *amici* organizations to the values of student journalism lend a perspective to this

presentation that we do not believe will be forthcoming from other parties to the case and warrant the acceptance of the brief submitted with this motion.

Respectfully submitted

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AMICI CURIAE, IN SUPPORT OF AFFIRMANCE.**

INTERESTS OF AMICI CURIAE

The *amici* represent, in the fashions described in the paragraphs immediately following, the interests of private journalism. We recognize that the First Amendment safeguards applicable to members of the *amici* organizations are different than those governing the outcome of this case. Student newspapers sponsored by public educational institutions present special constitutional considerations. The general interest of *amici* in securing First Amendment protection for journalism and the particular importance attached by an *amici* organizations to the values of student journalism led to the submission of this brief.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The National Association of Broadcasters is a non-profit, incorporated association of more than 4,800 radio stations, 950 television stations, and the major commercial broadcast networks.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors, dedicated to protecting the First Amendment interests of the news media. Since its founding in 1970, the Reporters Committee has appeared in virtually every major press freedom case considered by the U.S. Supreme Court.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 21,500 members representing every branch and rank of print and broadcast journalism. It is the largest organization of journalists in the United States.

SUMMARY OF ARGUMENT

Student journalists writing for school sponsored newspapers occupy a unique set of constitutional positions. Because the teaching and administrative supervisors of student papers are state actors, supervisory censorship of student works puts into play First Amendment considerations never engaged in the private newspaper relationships among reporters and their editors and publishers.

Precisely because those who supervise the efforts of student writers are teachers and school administrators, the unusual First Amendment considerations activated by state supervision of expression take on a special aspect. Within the schoolyard, the First Amendment must be applied, "in light of the special characteristics of the school environment. . . ." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Plainly, a great deal of caution is required before importing constitutional precepts from other areas to aid in the demarcation of rights in this doubly-different factual setting.

The District Court (and the petitioners' brief here) characterized the publication (or censorship) of the articles at issue as a matter ruled by the principles of school control over curricular content. The Eighth Circuit featured the resolution of the case to be governed by the fact that the school paper had many attributes in common with state-created public forums. These two approaches suggest an exclusivity (even antipathy) between the values of state control over educational direction and freedom of expression.

Although we believe that the proper constitutional analysis of the case lies somewhere between these two approaches, it is our impression that the precise location of the appropriate constitutional

safeguards need not be charted in resolving this case. Proper application of even the relaxed constitutional standard conceded by the petitioners will result in affirmance of the result reached by the Eighth Circuit.

ARGUMENT

I. The Censorship of Spectrum was Unconstitutionally Unreasonable.

The "Brief for the Petitioners" filed for Hazelwood School District, *et al.* ("School District Brief"), seeks to characterize this case as involving a conflict between two mutually exclusive legal categories. By the analysis of the School District Brief, the characterization of Spectrum as a "curricular" undertaking precludes extension of the First Amendment protections that would otherwise be associated with a state-created "public forum." Contrarily, the logic, if not the language, of the School District Brief requires the conclusion that if one determines Spectrum to be a "public forum" the considerations of educational autonomy that would normally attach to "curricular" concerns will be lost and the constitutional values reposed in the First Amendment rather than the balance of educational interests will determine the content of the student newspaper. Such a polar construction is not legally required and clashes considerably with the factual fabric of the case.

The Eighth Circuit surely had it right in concluding that Spectrum was "something more" than a classroom exercise:

Although, as the district court noted, *Spectrum* was produced by members of the *Journalism II* class, its staff was essentially restricted to students of that class and *Spectrum* was a part of the school adopted curriculum, it was something more. It was a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so. *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Kuhlmeier v. Hazelwood School District, 795 F.2d 1368, 1373 (8th Cir. 1986)

It is not necessary to accept the Eighth Circuit's conclusion that the student paper was a "public forum" in order to recognize the probity of the observation that the paper was "something more" than a purely curricular offering. Were the paper solely "curricular", there would have been neither need nor purpose for the School District to incur the apparently significant expense¹ of printing and distributing the paper. The fact of distribution unequivocally indicates that, whatever the primary ambition held by the school for the newspaper, some purpose in addition to the entirely academic was served by the paper.

The School District Brief's reliance on the "curricular" quality of *Spectrum* to evade constitutional protections strains the facts in another way. The censorship complained of was not the product of the core curricular design of the Journalism II class. The stories that served as the basis for suppressing two pages of the paper had passed through the "teaching" stages of the creative process recited by the District Court:

Each issue of *Spectrum* was produced according to the following procedure. Ideas for stories were collected from *Spectrum* staff members on a weekly basis. Another source of story ideas were the letters to the editor. The student editors, in consultation with Mr. Stergos, would then select from among those story ideas that they wanted to develop into articles for publication. Mr. Stergos would then assign individual staff members to work on the ideas selected and determine how long each story should be. . . .

The person assigned to a story idea would then begin researching and writing the story. Initially, the precise content of the story was left to the individual writer. However, once a draft was completed it was submitted to Mr. Stergos who would review the article, make comments, and return it to the student to be rewritten or researched further. . . .

A writer who used personal quotes in a story was required to obtain consent from each person quoted. The procedure for obtaining consent was to have the subject initial his quote on the draft.

¹See *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. 1450, 1454 (E.D. Mo. 1985) (administrative concern over the cost of the paper).

Once a final draft was completed, the story would be submitted in copy sheet form to the copy editor to be proofed, then to the layout editor to be arranged on the page. At this stage of the process, Mr. Stergos often edited the articles himself. After the proposed layouts were approved by Mr. Stergos, the copy sheets of the stories, together with the layout diagrams, were sent to Messenger Printing Company in Kirkwood, Missouri, where galley proofs were prepared. After the galley proofs were returned from the printer, the authors would each proofread their own stories and their work would be double checked by *Spectrum* staff members. Mr. Stergos also proofread all articles. Corrections would be telephoned to the printer.

Id. at 1454.

We do not mean to suggest by this recitation that involvement of the school principal in publication decisions necessarily takes judgments reached by such participation outside of the range of the "curricular". We do intend the sense that there may be constitutionally significant differences between a teacher's action in curtailing classroom discussion (or evaluating submissions for a grade or working any of a broad variety of day-to-day "censorships" of this sort) and a principal's judgment that an article approved through the regular curricular processes of a journalism class should not be run in a student newspaper. The unitary notion of curricular license advanced by the School Board Brief is not sufficiently subtle.

There is yet another flaw to the bimodal cast into which the School District Brief would force decision of the case. As the School District itself recognizes,² the characterization of the paper as "curricular" does not free the School District to indulge in censorship for no reason or any reason at all. Some constitutional protection is conceded to attach to the student article. As the School District Brief frames the matter (quoting *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439, 3451 (1985)) the suppression of the two *Spectrum* articles is permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are view-point neutral." School District Brief at 32.

Neither of the analytic extremes posited by the School District

²The District Court came to the same conclusion. *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. at 1466-67.

Brief applies to this case. Spectrum unarguably does have curricular importance; but it quite as plainly has extracurricular features as well. The School District Brief concedes as much in the recognition that censorship of the paper is constrained by some level of constitutional protection. The analytic contest, then, is not in classifying the student paper as either a pure "public forum" or a purely "curricular" undertaking, but rather to balance properly the requirements of necessary educational freedom to structure curricular affairs against the constitutional guarantees of freedom of speech. In short, the case does not admit of the nicely abstract dichotomy urged by the School District Brief.

Were it necessary to determine with precision the full extent of constitutional protection to which student papers such as Spectrum are entitled, the analysis would not be fully determined by the Court's earlier rulings. Although the *Tinker* case has very instructive directives that, we believe, would finally lead to the result reached by the Eighth Circuit, no precedent from the Court directly treats with the problem of assimilating the requirements of state sovereignty over partially "curricular" undertakings with the First Amendment protection accorded speech in a forum that is at least partially "public". More particular development of the *Tinker* analysis is not necessary to the disposition of this case. This is so because even the relaxed constitutional standard conceded by the School District Brief to apply to the censorship at issue here requires affirmance of the outcome directed by the Eighth Circuit. The censorship was palpably unreasonable.

At this level of analysis, this case is an easy one. The principal of Hazelwood East did not advance any reasoned or reasonable basis for the suppression of the two articles in question. Closer attention to the facts than the School District's brief is willing to indulge makes this conclusion clear.

The District Court characterized the principal's basis for suppressing the two articles in the following terms:³

However, Mr. Reynolds objected to both the three (3) personal accounts of pregnant Hazelwood East students and

³The stories that moved Mr. Reynolds to suppress two pages of the May 13 paper (along with the three stories deleted incidentally) were published by the St. Louis Globe-Democrat in its weekend magazine, "Globe Weekend". St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 5-10. We have reproduced the two pivotal stories as they were published in an appendix to this brief.

Shari Gordon's story on the impact of divorce on children. With respect to the personal accounts of three (3) Hazelwood East students who were pregnant, Mr. Reynolds was concerned that the girls had been described to the point where they could be identified by their peers. In addition, he objected to their discussion of their sexual activity. With respect to Shari Gordon's story, Mr. Reynolds objected to the use of Diana Herbert's name and the inclusion of the following quotes from her:

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer," . . . [4] "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me," . . .

In addition, Mr. Reynolds objected to the above portion of Shari Gordon's story, because he thought that fairness required that her parents be notified and given an opportunity to respond. This Court credits Mr. Reynolds' testimony.

Kuhlmeier v. Hazelwood School District, 607 F.Supp. 1450 at 1460.

It is not immediately obvious why Mr. Reynolds thought that "identification" of the three young women whose stories are detailed in the pregnancy article would be injurious, or who would likely be hurt by such identification. The District Court characterized the consequences of "loss of anonymity" as "unwarranted invasions of privacy". *Id.* at 1466. The School District Brief adds the gloss that the "invasions of privacy" would result from disclosure of "the personal material in the profiles relating to the subjects' sex lives." School District Brief at 34. Even if one could impute the School District Brief's embellishment on the trial court's enlargement of the explanation actually given by Reynolds to the principal, the privacy values protected by censoring the pregnancy article are illusory.

⁴This was an incorrect reading of the article. See p. 12, *infra* and Appendix at A-1.

It is most emphatically not the fact of pregnancy that suppression of the articles sought to keep private. The logic of the District Court analysis of the dangers of "identification" of the three pregnancy story subjects assumes that knowledge extrinsic to the article will place the young women quoted in the article within the population of "eight (8) to ten (10) students at Hazelwood East who were pregnant" in the spring of 1983. Inclusion within this relatively small — but not entirely relevant⁵ — sub-group of the women students at the school was thought to increase the risk of "identification." There surely was a time when the fact of pre-marital pregnancy was a closely guarded and private fact, but there is no evidence that any of the three subjects of the article enjoyed or sought such privacy.

The first of the pseudonymous subjects, "Terri," was approximately seven months pregnant at the time that the article would have run in the school paper (the story recites that her child was due to be born in July of that year). The article gives the distinct impression that "Terri" planned to continue attending school through the end of the Spring term.⁶ If that is so, there cannot, among her schoolmates, have been much secrecy to her pregnancy.

The third of the pregnant women, "Julie," similarly took no pains to conserve the secrecy of her condition.

I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it.

Appendix at A-4.

Thus, it cannot be the public fact of pregnancy that Mr. Reynolds was interested in holding private. There is no more weight to the School District Brief's suggestion that "personal material . . . relating to the subjects' sex lives" serves as a reasonable basis for censoring the pregnancy article. There is nothing of this sort in the article.

⁵The relevance of this group is suspect because two of the three students portrayed in the article had already given birth to their children and may well not have been part of the Spring of 1983 pregnant student populations.

⁶The trial judge read the article to say that "Terri" had dropped out of school. The piece does not say that. The reference in the "Terri" segment to the young woman's plan of not "coming back to school right away (September) because the baby will only be 2 months old" leaves with us the impression that she was in attendance for the Spring term. Appendix at A-3.

It is, of course, disclosed in the article that each of the three pregnant women had had sexual relations before becoming pregnant. This cannot have been a large revelation to the student body; as we point out immediately above, the women were known to be pregnant. There is precious little detail of the sexual practices of the three beyond the obvious fact of some sexual activity. "Julie" had this, and only this, to say about sexual intercourse:

There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything.

Appendix at A-4.

"Patti" says not a word about the mechanics of having become pregnant. "Terri" is the most expansively revealing of the three women on the subject of her sexual practices. She is quoted as saying:

I had no pressures (to have sex). It was my own decision. We were going out four or five months before we had sex.

Appendix at A-3.

If there is any room for vicarious parental solicitude for the privacy of an emancipated (because married)⁷ student, it surely is not reasonably engaged by consensual recitations of this sort.

Nor are there privacy rights of others violated by the article. One might briefly worry about the right of "sexual privacy"⁸ of the fathers involved. The marriage of one of the young women, impending marriage of a second⁹ and contemplated wedding of the third¹⁰ give evidence that such concern ought not to persist. Anyone who knows the women and knows of their pregnancy will almost surely also know the identity of the father. Anyone who does not know the predicate

⁷Missouri law considers marriage to constitute the emancipation of minors. See, e.g., *French v. French*, 599 S.W.2d 40, 41 (Mo. App. 1980).

⁸See, e.g., *City of North Muskegon v. Briggs*, 473 U.S. 909 (1985) (White, J. dissenting from denial of cert.); *Whiserhunt v. Spradline*, 464 U.S. 965 (1983) (Brennan, J. dissenting from denial of cert.)

⁹"[Patti:] After I graduate next year, we're getting married." Appendix at A-3.

¹⁰"[Julie:] We are still planning on getting married when we are financially ready." Appendix at A-4.

facts will, obviously, not know of the paternal association. The article adds nothing to this equation. Any "identification" of the three fathers will be accomplished quite without regard for anything contained in the article.

The District court (but, interestingly, not the School District Brief) also invoked disclosure of "use or non-use of birth control methods" as a private fact properly shielded from disclosure by suppression of the pregnancy article. The full scope of these disclosures is:

["Terri"] I was on no kind of birth control pills. I really didn't want to get them, not just so I could get pregnant. I don't think I'd feel right taking them.

["Patti"] Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

Appendix at A-3, 4.

The moral, ethical, and societal propriety of birth control are subjects that are broadly discussed throughout the nation and the world. The School District's zeal for maintaining the privacy rights of high school students who have consented to the publication of the statements set out above would disable those young people from taking a public stand on a question that might well be centrally important to them. We think it plainly unreasonable to burden free expression so expansively in the protection of unwanted privacy.

Finally, there is an intimation in both the District Court opinion and the School District Brief that publication of the pregnancy article would weaken the moral fiber of the students at Hazelwood East by giving the impression that school administration "endorses the sexual norms of the subjects of the articles", *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. at 1466. Although this expression hints at the prospect of moral decay, there is nothing in the article that comes close to this tone. An observation reported by the Court more than 40 years ago aptly disposes of this contention:

It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful.

Dysart v. United States, 272 U.S. 655,657 (1926).

As the Court held in *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), school teachers and administrators are quite properly (and reasonably) concerned with the general atmosphere of

the educational environment and may take steps, even when such action is inconsistent with untrammelled free expression, to secure the environment that they believe most conducive to efficient and effective education. But, as *Tinker* insisted, more than "undifferentiated fear or apprehension of disturbance"¹¹ is required as a basis for action. The *Fraser* case makes it clear that in certain circumstances¹² a special license is extended to educators to protect their charges from the exposure to lewd or indecent expression because such speech can reasonably be thought to be "disrupting" in a fashion properly committed to governmental supervision.

There is certainly nothing lewd about the divorce article. Nor is the student pregnancy article laden with sniggering innuendo of the sort contained in the *Fraser* nominating speech. Necessarily, an article concerning student pregnancy touches on the procreative process; one would be hard put to discuss pregnancy without some implication of the cause of the condition. Unless school administrators have the power to ban any discussion of student pregnancy, they are without power to suppress on the grounds of lewdness passing references, such as those in the article under examination here, to the sexual practices underlying the event.¹³

As is clear from the pregnancy article itself, the Hazelwood School District permitted pregnant unmarried women to continue their education. In doing so, the School District acknowledged the existence of pre-marital sex. If the physical presence of pregnant students on the school grounds is not thought by the School District to be impermissibly "disruptive", it is impossible for speech that does no more than to acknowledge the same facts to be viewed as inconsistent with the proper educational environment.

¹¹*Tinker v. Des Moines School District*, 319 U.S. at 640-641.

¹²The fact that Mr. Fraser's speech was imposed upon a captive audience, that Mr. Fraser had earlier been warned that his expression was "inappropriate" and, perhaps, the fact that the speech was presented orally rather than by a writing all distinguish the *Fraser* holding.

¹³The broadest formulation in favor of suppression of both articles — the conclusion that the subject matters of pregnancy and divorce are "inappropriate" for inclusion in a student newspaper — will not do as a matter of fact. Both subjects were treated in articles to which Mr. Reynolds voiced no objection. See, *Callow Sex and the Teenager*, St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 5; Conley, *Teen Marriages: A Bleak Outlook* St. Louis Globe-Democrat, February 9, 1985 (Magazine) at 6 (discussing teenage marriages and the divorce rates resulting from them).

The District Court found the following basis for Mr. Reynolds' suppression of the divorce story:

With respect to Shari Gordon's story, Mr. Reynolds objected to the use of Diana Herbert's name and the inclusion of the following quotes from her:

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer," . . .

"My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me."

Kuhlmeier v. Hazelwood School District, 607 F.Supp. at 1460. As the District Court correctly recognized earlier in its opinion, the first quotation set out above was not attributed in the article to "Diana Herbert", but to "a student who was identified only as a 'Junior'." *Id.* at 1457. The publication of an accusation that an identified or easily identifiable individual is an alcoholic might very well caution extreme care not only because of the impact that such a charge might have on the individual against whom it was levelled, but also because the publication might give rise to a defamation action. As the story was written, however, no identification of the parent was possible and reasonable concerns of either fairness or tort liability vanish.

The statements attributed to Diana Herbert in the proof sheet provided to Mr. Reynolds — a proof that neglected to reflect the fact that an editorial judgment had already been made to remove Diana Herbert's name and identify her only by her class in school — contains no hint of actionable, embarrassing or private charges comparable to the accusation of alcoholism.

The notion, advanced as one of the not entirely consistent explanations for Mr. Reynolds' response to the divorce article, that the failure to give Ms. Herbert's parents, "especially her father . . . any opportunity to respond or rebut her allegations" raises concerns that might be thought "curricular".¹⁴ The unfortunate confusion by which

¹⁴As the District Court pointed out, there was some basis in the text book used to teach the Journalism II class for holding the position that individuals about whom allegations are printed should be given an opportunity to rejoin. See *Kuhlmeier v. Hazelwood School District*, 607 F.Supp. at 1456-57.

Mr. Reynolds was deprived of knowledge of the editorial judgment to delete Ms. Herbert's name from the piece makes it impossible to know what his "curricular" assessment of the article in its intended form would have been. We do not believe it necessary to apply constitutional judgments on the basis of either a prediction of Mr. Reynolds' response to the article as it would have run or his response to a different (by the inclusion of Ms. Herbert's name) article than was intended for print. It was necessary for the District Court to uphold the reasonableness of Mr. Reynolds' action in suppressing each of the articles in order to find that no constitutional claim had been stated. If the Court determines that censorship of the pregnancy article violated constitutional protections, it is not necessary to proceed to an adjudication of the reasonableness of Mr. Reynolds' reaction to the divorce article.

CONCLUSION

The censorious judgments overridden by the Eighth Circuit in this case were not the work of a private publisher; they were the acts of government. State control over curricular content and acts disruptive of the efficient dissemination of it must be valued, but they must also be reasoned when they trench on constitutionally protected values of free expression. In purely academic settings the value of teacher control and the discount of that value by having to explain why it was exercised speak eloquently for the freedom from judicial second guessing.

In other, quasi-academic, settings both values change. As acts of censorship become less intimately a part of core curricular undertakings, they require greater justification. Here, the censorship came after the "teaching" phase of the Journalism II class was complete. None of the reasons advanced to explain the need for censorship will withstand even relaxed examination.

The judgment of the Eighth Circuit should be affirmed.

Respectfully Submitted

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APPENDIX

WHEN PARENTS SPLIT Kids Can Bear the Scars

By Shari Gordon

In the United States one marriage ends for every two that begin. The North County percentage of divorce is three marriages end out of four marriages that start.

There are more than two central characters in the painful drama of divorce. Children of divorced parents, literally millions of them, are torn by the end of their parents' marriage.

What causes a divorce? According to Mr. Ken Kerkhoff, social studies teacher, some of the causes are:

- Poor dating habits that lead to marriage.
- Not enough things in common.
- Lack of communication.
- Lack of desire or effort to make the relationship work.

Figures aren't the whole story. The fact is that divorce brings a psychological and sociological change to the child.

One junior commented on how the divorce occurred, "My dad didn't make enough money, so my mother divorced him."

"My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer," said another junior.

One freshman said, "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always argued about everything."

"In the beginning I thought I caused the problem, but now I realize it wasn't me," she added.

"I was only 5 when my parents got divorced," said Susan Kiefer, junior. "I didn't quite understand what the divorce between my parents really meant until about the age of 7. I understood that divorce meant my mother and father wouldn't be together again."

"It stinks!" exclaimed Jill Viola, junior. "They can, afterwards, remarry and start their lives over again, but their kids will always be caught in between."

Out of the 25 students interviewed, 17 of them have parents that have remarried.

The feeling of divorce affects the kids for the rest of their lives.

according to Mr. Kerckhoff. The effects of divorce on the kids lead to the following:

- Higher rate of absenteeism in school.
- Higher rate of trouble with school, officials and police.
- Higher rate of depression and insecurity.
- A higher rate of divorce when they themselves get married.

All of these are the latest findings in research on single parent homes.

**Student Pregnancy:
Three Personal Accounts
By Christine De Hass**

These stories are the personal accounts of three Hazelwood East students who became pregnant. All names have been changed to keep the identity of these girls a secret.

Terri:

I am five months pregnant and very excited about having my baby. My husband is excited too. We both can't wait until it's born.

After the baby is born, which is in July, we are planning to move out of his house, when we save enough money. I am not going to be coming back to school right away (September) because the baby will only be 2 months old. I plan on coming back in January when the second semester begins.

When I first found out I was pregnant, I really was kind of shocked because I kept thinking about how I was going to tell my parents. I was also real happy. I just couldn't believe I was going to have a baby. When I told Paul about the situation, he was real happy. At first I didn't think he would be because I wasn't sure if he really would want to take on the responsibility of being a father, but he was very happy. We talked about the baby and what we were going to do and we both wanted to get married. We had talked about marriage before so we were both sure of what we were doing.

I had no pressures (to have sex). It was my own decision. We were going out four or five months before we had sex. I was on no kind of birth control pills. I really didn't want to get them, not just so I could get pregnant. I don't think I'd feel right taking them.

At first my parents were upset, especially my father, but now they're both happy for me. I don't have any regrets because I'm happy about the baby and I hope everything works out.

Patti:

I didn't think it could happen to me, but I knew I had to start making plans for me and my little one. I think Steven (my boyfriend) was more scared than me. He was away at college and when he came home we cried together and then accepted it.

At first both families were disappointed, but the third or fourth month, when the baby started to kick and move around, my boyfriend and I felt like expecting parents and we were excited! My parents really like my boyfriend. At first we all felt sort of uncomfortable around each other. Now my boyfriend supports our baby totally (except for housing) and my parents know he really does love us, so they're happy.

After I graduate next year, we're getting married. My boyfriend and I have a beautiful relationship and it's been that way ever since three years ago. Therefore, I really do think that the future looks good for baby Steven. I want to say to others that it isn't easy and it takes a strong, willing person to handle it because it does mean giving up a lot of things. If you're not willing to give your child all the love and affection around, you can't be a good parent.

Lastly, be careful because the pill doesn't always work. I know because it didn't work for me.

This experience has made me a more responsible person. I feel that now I am a woman. If I could go back to last year, I would not get pregnant, but I have no regrets. We love our baby more than anything in the world (my boyfriend and I) because we created him! How could we not love him? . . . He's so cute and innocent...

Julie:

"At first I was shocked. You always think, "It won't happen to me." I was also scared because I did not know how everyone was going to handle it. But, then, I started getting excited.

There was never really any pressure (to have sex), it was more of a mutual agreement. I think I was more curious than anything. I had always planned on continuing school. There was never any doubt about that. I found that it wasn't as hard as I thought it would be. I was fairly open about it and people seemed to accept it. Greg and I did not get married. We figured that those were not the best circumstances, so we decided to wait and see how things go. We are still planning on getting married when we are financially ready. I also am planning on going to college at least part-time.

My parents have been great. They could not have been more supportive and helpful. They are doing everything they can for us and enjoy being "grandma and grandpa." They have also made it clear it was my responsibility.

AMICUS CURIAE

BRIEF

MOTION FILED
MAY 26 1987

86-836

(5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, et al.,
Petitioners,

—v.—

CATHY KUHLMEIER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND
BRIEF OF AMICI CURIAE**
**NOW Legal Defense and Education Fund, National
Organization for Women, Children's Defense Fund, Equal
Rights Advocates, Inc., Women's Equity Action League,
Women's Law Project**
In Support of Respondents

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INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the attached appendix to this brief, together with a motion for leave to file this brief pursuant to Rule 36.3 of the Rules of this Court.

STATEMENT OF THE FACTS

On May 13, 1983, petitioner Robert Eugene Reynolds, who is the principal of Hazelwood East High School,¹ ordered the censorship of articles about teenage pregnancy and the effects of divorce on children along with all other articles

¹ Other petitioners here are the Hazelwood School District, Dr. Thomas S. Lawson, superintendent of the Hazelwood School District, Dr. Francis Huss, assistant superintendent of the Hazelwood School District, Howard Emerson, a teacher in the Hazelwood School District, as well as the following members of the Hazelwood School District Board of Education: Charles E. Sweeney, Joseph E. Donahue, Gwendolyn L. Gerhardt, August A. Busch, Jr., Ann Gibbons, and James E. Arnac. Petition for Writ of Certiorari, No. 86-836, at ii.

appearing on two pages in the student newspaper, the Spectrum.² Petitioner Reynolds censored one article describing the health, social, and economic problems of teen pregnancy and providing as part of this cautionary report interviews with three Hazelwood East students who had become pregnant.³ Petitioner Reynolds

² Mr. Reynolds made this decision under unusual circumstances: he read the uncorrected galley proofs for the first time while talking on the phone with the substitute faculty advisor for the student newspaper and while under the mistaken impression that the substitute advisor was standing at the printing company and required an immediate decision about publication. Kuhlmeier v. Hazelwood School District, 607 F. Supp. 1450, 1458-59 (E.D. Mo. 1985). Under usual circumstances, the regular faculty advisor, who also taught the journalism class in which the newspaper was produced, maintained constant involvement with the stories and editing process, and submitted the newspaper to the principal prior to sending it to the printer. Id. at 1454.

³ One of the pregnant teens gave this message about teen pregnancy: "I want to say to others that it isn't easy and it takes a strong willing person to handle it

censored this article and the story about the impact of divorce because he believed that they were "too sensitive" for their "immature audience of readers," and otherwise "controversial," "personal," "inappropriate," "unsuitable," and "totally unnecessary." 607 F. Supp. at 1459-60 (Finding of Fact No. 14). He also justified the censorship because he believed that the three pregnant girls, although described by pseudonyms, could be identified by their peers, and because he objected to "their discussion of their sexual activity." Id. at 1460 (Finding of Fact No. 15). Petitioner Reynolds also

because it does mean giving up a lot of things ... Lastly, be careful because the pill doesn't always work. I know because it didn't work for me." And she reported, "If I could go back to last year, I would not get pregnant." "Patti," Pressure Describes It All For Today's Teenagers: Pregnancy Affects Many Teens Each Year, Spectrum, May 13, 1983 (never published).

censored the divorce article because he mistakenly believed the article would mention a student by name and therefore he thought that her parents should be notified and given an opportunity to respond, id. at 1460 (Finding of Fact No. 15). Petitioner Reynolds ordered deletion of all other stories appearing on the same galley pages with the two articles he targeted for censorship. As a result, the principal's actions also censored an article on teen marriages, another on runaways and juvenile delinquency, a third on the statistical incidence of teen pregnancy, birth control, and abortion, and a fourth about a proposed federal regulation that would require federally funded clinics to notify parents when their minor daughters sought birth

control assistance. Kuhlmeier, 607 F. Supp. at 1459.⁴

Respondents, as students, produced the issue of the student newspaper that was censored on May 13, 1983.⁵ In this action, respondents seek declaratory relief and damages for the violation of their First Amendment rights incurred by the censorship of the May 13, 1983 issue of the student newspaper.

The District Court permitted this action to proceed after respondents'

⁴ Petitioners never explained why they could not have published the deleted pages with only the allegedly objectionable articles removed. Kuhlmeier v. Hazelwood School District, 795 F. 2d 1368, 1375 (8th Cir. 1986).

⁵ Cathy Kuhlmeier was the layout editor, Leslie Smart was a newswriter and movie reviewer, and Lee Ann Tippet-West was news feature writer, cartoonist, and part-time photographer. All three participated in the production of the censored issue, although none of them were the authors of the censored articles. Kuhlmeier, 607 F. Supp. at 1451.

graduation from high school because it held that their damages claims survived graduation, and hence a case or controversy was present; the court held that their claim for declaratory relief was also viable.⁶

The Court found that the student newspaper, which was produced for the most part in conjunction with the Journalism II course, included matters of interest to the entire school community, and included articles in the past that covered the following topics:

"1) teenage dating; 2) the effects of television on children; 3) students' use of drugs and alcohol; 4) race relations; 5) teenage marriage; 6) the death penalty; 7) the St. Louis Schools desegregation case; 8) runaways; 9) teenage pregnancy; 10) religious cults; 11) the draft; 12) school

⁶ The court dismissed plaintiffs' claims for injunctive relief as moot. Kuhlmeier v. Hazelwood School District, 596 F. Supp. 1422 (E.D. Mo. 1984).

busing; and 13) students' fourth amendment rights." Kuhlmeier, 607 F. Supp. at 1453. The District Court concluded that the newspaper was part of a school-sponsored program. Id. at 1463, 1465. The Court held that while the First Amendment nonetheless applied to restrain school official control of the paper, the officials satisfied a requirement of "demonstrat[ing] that there was a reasonable basis for the action taken, based on the facts before them at the time of the conduct in question." Id. at 1466.

The Court of Appeals for the Eighth Circuit reversed and held that petitioners failed to satisfy the requirement articulated by this Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), that "student expression may be curtailed only when it 'materially disrupts classwork or involves substantial

disorder or invasion of the rights of others.'" Kuhlmeier, 795 F.2d 1368, 1371 (quoting Tinker, 393 U.S. at 513). The Court of Appeals also concluded that the student newspaper was a public forum "because it was intended to be and operated as a conduit for student viewpoint." Id. at 1372. Petitioners sought a writ of certiorari which this Court granted on January 20, 1987. Kuhlmeier v. Hazelwood School District, 795 F.2d 1368 (8th Cir.), cert. granted, 55 U.S.L.W. 3493 (1986) (No. 86-836).

It is undisputed that petitioners offered no evidence, at any time, that the censored articles threatened material disruption of classwork or substantial disorder, nor do petitioners make such a claim here. At the time of his actions, petitioner Reynolds explained to student staff members of the Spectrum that he

censored the articles because they were "'too sensitive' for 'our immature audience of readers.'" Kuhlmeier, 607 F. Supp. at 1459. Subsequently, at trial, Mr. Reynolds testified that he objected only to the story which included the personal accounts of three pregnant students and the story about the impact of divorce on children, and removed the other stories because they were on the same pages. He said that he objected to the story about the pregnant teens because even though their names were not used, they could be identified by their peers, and because the description of their sexual activity could imply school approval. Id. at 1460. He objected to the use of a student's name in the story on

divorce,⁷ and to the failure to notify that student's parents and give them an opportunity to respond to the story. Id. Here, petitioners claim that the stories risked violating the privacy rights of others. Petition for Writ of Certiorari, No. 86-836.

The Spectrum operated under School Board policies recognizing the rights of students to express their own opinions in writing and endorsing student coverage of controversial issues. Kuhlmeier, 607 F. Supp. at 1455-56 (citing Board Policies 348.5, 348.51, and 341.5). The students who were the sources of information for the censored articles spoke voluntarily to student reporters knowing that the result

⁷ Mr. Reynolds did not know that the faculty advisor to the newspaper had already deleted the student's name from the copy that was sent to the printer. Kuhlmeier, 607 F. Supp. at 1458-59.

would be the stories that were ultimately censored. These stories were deleted without notice to the newspaper staff. After the censorship, several staff members met with Mr. Reynolds to protest the deletions; the student editors and reporters then voted to distribute the censored version of the paper. Id. at 1459. The censored articles themselves were photocopied and distributed throughout the school, and petitioners made no effort to stop this distribution nor to punish the individuals who made them available to other students. Id. at 1461; Kuhlmeier, 795 F.2d., at 1371.⁸ There is no evidence or suggestion that this circulation of the censored articles caused or threatened to

⁸ As the Court of Appeals noted, "the controversy over the articles served only to ensure that the offending articles were secured and widely read." Kuhlmeier, 795 F.2d. at 1371 n.2.

cause material disruption or violation of the rights of other students. Kuhlmeier, 795 F.2d at 1375. There is evidence only that the school officials did not think these stories were necessary, and censored them in violation of respondents' First Amendment rights.

ARGUMENT

I. CENSORSHIP OF STUDENT SPEECH ABOUT TEEN PREGNANCY VIOLATES THE FIRST AMENDMENT AND BANS EXPRESSION OF CRITICAL SUBJECT OF PUBLIC CONCERN

When the principal of the public high school, Hazelwood East, censored student newspaper articles about teen pregnancy,⁹

⁹ The principal expressly objected to an article describing the experiences of three pregnant teenagers identified by pseudonyms, and also censored an article on the "squeal law" and another on statistical information about teen pregnancy, avowedly because these appeared on the same page with the first article. The principal also explicitly objected to an article describing the experience of a student whose parents were divorced, and directed the

he cut into the core of the First Amendment protections for student expression and speech about critical subjects of public concern. The student authors¹⁰--and student readers¹¹ -- of the articles enjoy

removal of articles about teen marriage, runaways and delinquency that appeared on the same pages.

¹⁰ Respondent students' interest in this case is not moot, as the District Court Concluded, because they seek damages for the violation of their constitutional rights and declaratory relief. See Kuhlmeier, 596 F. Supp. 1422 (E.D. Mo. 1984).

¹¹ This Court has repeatedly recognized the rights of readers to receive information. See, e.g., Lamont v. Postmaster General 381 U.S. 301 (1965); Martin v. Struthers, 319 U.S. 14 (1943). In his concurring opinion in Lamont, Justice Brennan stated, "The right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. at 403. Of course, the fact that student readers are not forced to receive the information in the student newspaper, but must instead choose to pick it up and read it, provides assurance that the readers

the First Amendment rights to express and exchange views as declared in Tinker v. Des Moines School District, 393 U.S. 503 (1969) and West Virginia School State Board of Educ. v. Barnette, 319 U.S. 624 (1943). This case provides no reason to depart, as the District Court did, from the framework established by this Court in Tinker, a framework recognizing and enforcing students' rights of free expression absent a showing of material and substantial interference with the business of the school or the rights of others. Tinker, 393 U.S. at 509.

(A) Teen Pregnancy is a Critical Subject of Public Concern

First Amendment rights are nowhere stronger than when the subject of expression is public issues -- those issues

are free from risks of being turned into a captive audience. See, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

"about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Thornhill v. Alabama 310 U.S. 88, 102 (1940)). For adolescents in this decade, information about teen pregnancy and related health matters is essential to enable these individuals to cope with their worlds. Each year, more than 1 million adolescents¹² become pregnant; of those 1 million or more teenage pregnancies, three out of four are unintended.¹³ It is estimated

¹² Teenagers includes adolescents through the age of 19.

¹³ Children's Defense Fund, Preventing Children Having Children: What You Can Do 1 (1986). The average teen becomes sexually active at 16, and the U.S. leads the industrialized nations of the world in the number of teenage pregnancies, births, and abortions, just counting white teens alone. Id. at 3. A Planned Parenthood Poll conducted by Louis Harris in 1986

that each year 135,000 female students drop out of high school due to pregnancy.¹⁴

To understand their own choices, and the situations of their peers, adolescents need information about pregnancy and its risks.¹⁵ Pregnancy and parenthood during

showed that 20% of 14-year-olds, 29% of 15-year-olds, 46% of 16-year-olds, and 57% of 17-year-olds have had sexual intercourse. Louis Harris and Associates, American Teens Speak: Sex, Myths, TV, and Birth Control: The Planned Parenthood Poll, (Project No. 864012) Table 1-1 (1986). And 40% of those teens between 14 and 15, and 18% of those between 16 and 17 never use contraceptives when they have intercourse. Id. Table 1-4.

¹⁴ Forty-one percent of the females who drop out of high school cite pregnancy or marriage as their reason--and marriage is generally due to a pregnancy. Children's Defense Fund, Data Memo (Sept. 9, 1986).

¹⁵ The need for information is great. While American teens have about the same rate of sexual activity as their counterparts in Sweden, France, or Canada, the pregnancy rate for women under twenty in the U.S. is 10%, which is twice that found in Canada, England, and France--and seven times the rate in the Netherlands. Children's Defense Fund, Adolescent Pregnancy: Whose Problem Is It? 5-6

adolescence prevent thousands of adolescents from continuing with their education and interfere with their development of economic self-sufficiency, and yet many teens do not understand these risks. In addition, there is a price paid by the children of teenage mothers and by society as well. Children born to teenage mothers are at a developmental disadvantage to children born to older mothers; such children also suffer psychological problems, and more often display misbehavior

(January 1986).

There is much to be done in terms of educating our youth on the dangers of sexual activity and pregnancy. Next fall, the City Volunteer Corps, a kind of Peace Corps for young people in New York City, will begin peer counseling on issues of sex, self-esteem, and responsibility. The hope is that teens will be able to discuss these issues, with official guidance, and become better educated in these areas. As one commentator has noted, "Adults have so far failed to persuade youngsters to delay sexual activity or practice contraception. Maybe ... their peers can succeed." N.Y. Times, March 26, 1987 at A26, col. 2.

and a low level of academic performance.¹⁶ Realistic and effective information about the risks of teenage pregnancy is difficult to communicate to teens inundated with mass media images about sexuality.¹⁷ The

¹⁶ F. Furstenberg & J. Brooks-Gunn, *Teenage Childbearing: Causes, Consequences and Remedies* 19-22 (May 1985). Two criminologists have noted the criminogenic effects of teenage pregnancy: "Children born and reared out of wedlock, especially the products of unintended teenage births among the poor, are more likely to exhibit physical defects; have improper diets; suffer emotional problems that cause them to be listless, tired, underactive, or aggressive; and consequently emerge as likely candidates for the high-risk delinquency group." Marvin E. Wolfgang & Bernard Cohen, *The Memphis Report on Crime-1987* 96-97 (Crime Research Associates, February 1987).

¹⁷ Teens often receive the wrong message about sex--that it is painless and glamorous. "Movies, music, radio, and TV tell them that sex is romantic, exciting, titillating; premarital sex and cohabitation are visible ways of life among the adults they see and hear about... Almost nothing that they see or hear about sex informs them about contraception or the importance of avoiding pregnancy. For example, they are more likely to hear about abortions than about contraception on the

information American teenagers typically do receive about sex does not provide them with the information they need to address their questions about delaying sexual intercourse, and the dangers of teen

daily TV soap opera. Such messages lead to an ambivalence about sex that stifles communication and exposes young people to increased risk of pregnancy, out-of-wedlock births and abortions." E. Jones et al., Teenage Pregnancy in Developed Countries: Determinants and Policy Implications, 17 *Family Planning Perspectives*, Mar.-Apr. 1985 at 53, 55.

Dr. Louella Klein, former president of the American College of Obstetricians and Gynecologists (ACOG) and current director of their public education campaign, finds the popular presentation of sex a big problem in dealing with teen pregnancy: "Many teenagers feel that sex life is like what they see on TV -- all this instant intimacy but no mention of pregnancy... You see all this sexuality, but you never see the results of the sexuality." ACOG tried without success to convince three major networks to air public service announcements aimed at reducing teen pregnancy. Teen Pregnancy "Too Controversial" for TV, *Youth Law News*, Sept.-Oct. 1985 at 5.

pregnancy and disease.¹⁸ In a plea for a responsible sex education, the Surgeon General of the United States, Dr. C. Everett Koop, recently stated that

[E]very place [children] look, sex is glamorized. If they watch soap operas, there's sexual intercourse 1.56 times per hour ... My approach has always been that you teach children by answering their questions honestly. But if they get to the age of 9, 10, or 11, and they haven't asked some questions, you'd better tell them a few things because they're going to start facing some real situations.¹⁹

The fourteen- to eighteen-year-old high school students in Hazelwood East High School already face these real situations;

¹⁸ See 17 Family Planning Perspectives, supra note 17. President Reagan, exploring ways to limit exposure to the AIDS virus, has recently called for a renewed and vigorous approach to sex education. "Reagan Urges Sexual Abstinence As Part of Education On AIDS," Boston Globe, April 2, 1987, at 1.

¹⁹ D. Denison, The Interview: C. Everett Koop, The Boston Globe Magazine, March 22, 1987, at 2.

they have classmates who are pregnant, and others who risk pregnancy. This subject is of vital concern, and information about it could make all the difference to students' choices about how to lead their own lives. By his act of censorship, the school principal cut off students' access to critical statistical information about teenage pregnancy and birth rates, important facts about the legal status of adolescents' privacy rights, and interviews with three pregnant teenagers who each discussed her reaction to becoming pregnant, her plans for the future, and her use or non-use of birth control methods.²⁰ Each of these sources of information could significantly affect an individual student's decision to forego sexual activity, or to seek birth control counseling. In a

²⁰ Kuhlmeier, 607 F. Supp. at 1457.

recent survey, two-thirds of those teens who had not had sexual intercourse responded to questions about what would make teens abstain from sexual activity by stating that telling teens how a pregnancy could ruin their lives would be likely to influence a teen to wait to have sexual relations.²¹

The censored article on the experiences of pregnant students would have served as a much needed corrective to popular images of sexual activity. The article showed that sexual activity has serious consequences. It made the crucial connection between early sexual activity, unwanted and unplanned pregnancies, and severe educational and economic hardships for the girls who became pregnant. Moreover, the article demonstrated that not

²¹ Harris poll, supra note 13, at Table 6-2.

just "bad girls," but also typical, "normal" students become pregnant. All three teens in the interview thought that pregnancy would not happen to them.²² These facts could jolt young people out of their complacency--out of the illusion of safety created by an image that only "bad girls" get pregnant. By using personal, vivid factual information, the article spoke in the manner most likely to reach teenagers and affect their comprehension of the seriousness²³ of teen pregnancy It

²² Terri: "When I first found out I was pregnant, I was really kind of shocked ... I just couldn't believe I was going to have a baby."

Patti: "I didn't think it could happen to me ..."

Julie: "At first I was shocked. You always think 'It won't happen to me.'" Pressure Describes It All For Today's Teenagers, supra note 3.

²³ The Harris poll, supra note 13, demonstrates that teens will delay having sexual relations if they are informed of the dangers of pregnancy and the dangers of AIDS and other sexually transmitted

spoke to teens in the voices of their peers, and described the actual experiences of classmates. The article was realistic and cautionary, and served an important purpose that makes its censorship especially unfortunate. Open discussion of teen pregnancy is essential to solve the problem. Censorship of this discussion keeps teens ignorant and likely to repeat the mistakes of their peers.

Not only are the articles about teen pregnancy subjects of critical public concern for teens, but, as this Court has previously noted, the most paramount of interests are served by information relevant to constitutionally protected privacy decisions about procreation and contraception. Carey v. Population Services International, 431 U.S. 678

diseases. Table 6-2.

(1977); Bigelow v. Virginia, 421 U.S. 809 (1975). This Court has accorded significant constitutional protections even where speech about these privacy interests arises in merely commercial speech, which is entitled to less protection than the expression of individual views safeguarded at the heart of the First Amendment. See Posadas de Puerto Rico Association v. Tourism Co., 106 S.Ct. 2968, 2979 (1986). Thus, in Bolger v. Youngs Drugs Products Corp., 436 U.S. 60 (1983), the Court reasoned that, "where--as in this case--a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount." Id. at 69. Surely, the interests served by publication of information in the student newspaper

about pregnancy and birth control are no less weighty.

(B) The First Amendment Protects Student Discussion of Critical Issues of Public Concern

Hazelwood East High School designed its student newspaper to implement the First Amendment, and the censorship at issue here violates the very commitment to the First Amendment embraced by the School officials themselves. The Hazelwood School District officials designed the student newspaper as a vehicle for free expression, governed fully by the First Amendment. The expressed educational purposes of the journalism class at Hazelwood demand adherence to First Amendment practices, sensitive as always to the special context of the school. The Hazelwood School's curriculum guide describes the class as a "laboratory situation," and the announced and published policies of the Hazelwood

School Board commit the school to providing a laboratory experience with freedom of expression.²⁴

The newspaper's own governing policy, written under faculty supervision and published with the approval of the principal, declares that the paper, "as a student-press publication, accepts all

²⁴ See Hazelwood School Board Policy No. 348.5: "Student Publications": "a. Students are entitled to express in writing their personal opinions. The distribution of such material on school property may not interfere with or disrupt the educational process. Such written expressions must be signed by the authors." See also Hazelwood School Board Policy No. 348.51: "School Sponsored Publications": "School sponsored publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The policies also provide for editorial review of articles submitted by students who are not in the journalism class; this review is conducted by a faculty-student board composed of the principal, publications teacher, two other teachers, and two students. Kuhlmeier, 607 F. Supp. at 1455-56.

rights implied by the First Amendment of the United States Constitution which states that: 'Congress shall make no law restricting ... or abridging the freedom of speech or the press ...' That this right extends to high school students was clarified in the Tinker v. Des Moines Community School District case in 1969." Kuhlmeier, 607 F. Supp. at 1455. Instruction in the meaning of the First Amendment will amount to a lesson in empty slogans if the censorship of pure speech about matters of vital public concern, especially to high school students, is sanctioned here.²⁵

²⁵ The newspaper in the past has published stories about teenage dating, students' use of drugs and alcohol, runaways, cults, and other important topics, Kuhlmeier, 607 F. Supp. at 1452 (Finding of Fact No. 4), which establishes its status as a medium for expressing information and views on the variety of contemporary topics occupying the interests of the students. Censorship now would unconstitutionally constrict the range of ideas already permitted in the newspaper

Recognizing the First Amendment rights of the student authors and readers in the Hazelwood East High School does not require declaring the school newspaper to be a public forum, even though the Court of Appeals for the Eighth Circuit reached this conclusion below. Kuhlmeier, 795 F.2d at 1368.²⁶ As the Court ruled in Tinker, a student's rights "do not embrace merely the

because "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965). "The right to privacy in matters affecting procreation also applies to minors ... [and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception." Bolger, 463 U.S. at 74 n. 30 (citations omitted).

²⁶ The court recognized that a school newspaper is not a private forum. "[A] school is not like a hospital or a jail enclosure.... It is a public place, and its dedication to specific uses does not imply that the constitutional rights of those entitled to be there are to be gauged as if the premises were purely private property." Tinker, 393 U.S. at 512 n. 6 (citations omitted).

classroom hours" but also apply "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours...." 393 U.S. at 512. Central to the First Amendment rights of students is "personal intercommunication among the students," *id.*, such as that facilitated through a student newspaper.

Even where a student newspaper is arguably part of the curriculum, and is produced within the context of a journalism class under a teacher's guidance, the school's regulation cannot stifle the content of the publication or suppress views "with which school officials do not wish to contend." Burnside v. Byars, 363 F.2d 744, 749 (1966) (quoted and cited with approval in Tinker, 393 U.S. at 511). Accord Shanley v. Northeast Independent School District, 462 F.2d 960, 969 (5th Cir. 1972). The First Amendment still

applies to a student newspaper produced as part of a course because the students are not speaking as agents of the state, Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), *aff'd* 564 F.2d 157 (4th Cir. 1977), and because

[i]n our system, students may not be regarded as the closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Tinker, 393 U.S. at 511. Absent a specific showing of material and substantial interference with the requirements of appropriate discipline in the operation of the school or protection of the rights of others, Tinker, 393 U.S. at 513, student-authored articles about topics and viewpoints chosen by the students constitute speech entitled to First Amendment protec-

tion and provide information which other students are entitled to receive. Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 866-67 (1982) (plurality) (opinion of Brennan, J.). In particular, the State must not restrain teens from sharing accurate information about pregnancy with one another. Stifling speech about pregnancy expressed with the guidance of a journalism teacher eliminates a source of responsible information and leaves teens with the likely alternative of traditional misinformation.

Denying First Amendment protection to student speech in a student newspaper would contravene the central mission of public schools in "educating the young for citizenship [, which] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not

to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Tinker, 393 U.S. at 507 (quoting West Virginia State Board of Education v. Barnette, 319 U.S. at 637). The First Amendment applies to the student newspaper in the Hazelwood School District, and its protections are most stringent where, as here, school officials acted in prior restraint and prevented the publication of information about teen pregnancy, information that is of vital public interest to the students and concerns the students' own constitutionally protected privacy rights.

II. CENSORSHIP OF THE STUDENT NEWSPAPER ARTICLES ABOUT TEEN PREGNANCY DISCRIMINATES ON THE BASIS OF CONTENT AND VIEWPOINT WITHOUT SETTING LIMITS TO GOVERNMENTAL POWER

The principal's ban of the newspaper

articles about teen pregnancy²⁷ was pure content discrimination, which is the worst form of government abridgment of speech. See Widmar v. Vincent, 454 U.S. 263 (1981); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (rejecting government prohibition of supply of information to consumers about the prices of over-the-counter drugs); Police Department of the City of Chicago v. Mosely, 408 U.S. 92 (1972) (rejecting picketing ordinance that was not content-neutral); Mills v. Alabama, 384 U.S. 214 (1966) (rejecting ban against

²⁷ In addition to the articles on the three pregnant teenagers and the impact of divorce on teens, the principal's censorship eliminated four other articles concerning topics of public importance that are also subjects of controversy. See supra n.9. As the Court of Appeals noted, the action of the principal appeared to embody a belief that "divorce is per se an inappropriate subject for high school newspapers." Kuhlmeier, 795 F.2d. at 1376.

discussion of a political candidate on the last day of an election). The power of these pronouncements against content discrimination does not stop at the door to the school: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). School officials have special functions in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Ambach v. Norwick, 441 U.S. 68, 76 (1979).

These socializing functions justify grants of authority to school officials, such as their provision of a faculty supervisor for the student newspaper. Their power does not, however, carry with it the right to apply selectively the protections of the First Amendment.

The censorship of a story about teenage pregnancy, created by interviewing members of the student body, whose identities were protected, which explained each student's reaction to becoming pregnant, her plans for the future, the reactions of her parents and the father, and her birth control practices, is unlawful content discrimination. Censorship of this article eliminated information of great public concern, relevance, and interest to the student readers, and silenced the student author and the students she interviewed who wanted to share their stories.²⁸ The censorship eliminated the article called "Pressure Describes It All for Today's Teenagers: Pregnancy Affects Many Teens Each Year" and thus deprived student readers of statistical information about

²⁸ See SUPRA notes 12-23 and accompanying text.

the incidence and problems of teen pregnancy, birth control, and abortion. The principal also censored another article discussing a proposed federal rule that would have required federally-funded clinics to notify parents when teens sought birth control assistance. Even if these stories did not address the very issues about which the Surgeon General of the United States urges education, petitioners' fear that some students may not be mature enough to read them presents no satisfactory basis for the act of censorship.²⁹

Even in the context of the school, where governmental officials have special obligations and prerogatives, suppression

²⁹ See Carey, 431 U.S. at 715 ("Although a state may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate.") (Stevens, J., concurring in part and concurring in the judgment).

of information about a particular subject can stand only if the school officials demonstrate that the prohibition was "necessary to avoid material and substantial interference with school work or discipline...or the rights of others." Tinker, 393 U.S. at 511. There has been no suggestion that the school officials predicted material or substantial interference with school work or discipline, or the rights of others,³⁰ and thus there is no

³⁰ The principal was afraid that the teenage girls could be identified from the articles. The District Court stated that this potential "loss of anonymity could have resulted in unwarranted invasions of privacy." Kuhlmeier, 607 F. Supp. at 1466. The court also found that the three pregnant teens were told in advance that the information they would give would be published in the Spectrum, and that pseudonyms would be used. Id. at 1458. The Court of Appeals found that no invasion of privacy action could be brought by the pregnant girls, their parents or the fathers. Kuhlmeier, 795 F.2d at 1376. For a discussion of the potential for an invasion of privacy, see infra Section III.

justification which the First Amendment countenances for restriction of freedom of expression.

The principal's acts also amounted to an unconstitutional viewpoint restriction. The principal explained that he censored the article reporting on the three teenagers' experiences with pregnancy because their views--and apparently their behavior, which was of necessity related through their stories--were inconsistent with attitudes of schools officials.³¹ His publication ban shows that only attitudes consistent with those of schools officials may be expressed by students in the newspaper. This governmental intolerance for other views is precisely what the First Amendment forbids. "[T]he State may not suppress exposure to ideas--for the sole

³¹ Kuhlmeier, 607 F. Supp. at 1460.

purpose of suppressing exposure to those ideas--absent sufficiently compelling reasons." Board of Education v. Pico, 457 U.S. at 877 (Blackmun, J., concurring in part and concurring in the judgment). It cannot be a sufficiently compelling reason for censorship that the school officials feared that an article would create the impression that the school endorsed the sexual norms of the girls in the article.

Kuhlmeier, 795 F.2d at 1375.³²

³² Kuhlmeier, 607 F. Supp. at 1466. It should be noted that the message in the stories of the three teenage girls, part of a large article entitled "Pressure Describes It All for Today's Teenagers: Pregnancy Affects Many Teens Each Year," was one of warning, not encouragement. The article relies heavily on a Reader's Digest article, and the first part of the article cites the problems of teenage pregnancy, noting health problems and the interruption of schooling.

Taken in its proper context, the story about the three pregnant girls is more important than any impersonal lecture or warning these students could ever receive. Students who read the article are faced with the harsh realities and consequences

By rejecting speech inconsistent with the views of the school administration, petitioners deliberately restricted the content of speech to match their own views. This intolerance for any but the government's views is unacceptable under the First Amendment, and surely such intolerance is unacceptable in public education.

of sexual activity. Rather than an abstract warning, the article offers a chance to learn a lesson from the mistakes of others. In a hypothetical world where abstinence is assured, there might be no reason to discuss this issue among teens. But we do not live in such a world. As Justice Stevens stated in Carey, 431 U.S. at 714, "Common sense indicates that many young people will engage in sexual activity. ...Although many young persons theoretically may avoid [venereal disease and premarital pregnancy] by practicing total abstinence, inevitably many will not." (concurring in part and concurring in the judgment).

The act of censorship amounts to an unconstitutional viewpoint restriction. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for...its correction...on the competition of other ideas." Gertz v. Robert Welch, 418 U.S. 323, 339-40 (1974) (footnote omitted).

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." West Virginia State Board of Education v. Barnette, 319 U.S. at 637. Even in the classroom curriculum, the school administration cannot present only one orthodox position, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967),³³ nor exclude views it does not like. "School officials do not possess absolute authority over

³³ We are all familiar with the ringing statement in Barnette: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia School Board of Education v. Barnette, 319 U.S. at 642. It is notable that these memorable sentences of the Barnette opinion arose in the context of not just a school, but an elementary school whose students were presumably less mature than the high school students at issue in this case.

their students.... [Students] may not be confined to the expression of those sentiments that are officially approved." Tinker, 393 U.S. at 511. Even if the Hazelwood East High School newspaper is connected to a curricular offering, the school officials cannot exclude a newspaper story about teen pregnancy simply because they disapprove of the ideas or the actions described in the story. "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom." Barnette, 319 U.S. at 642.³⁴

Petitioners must establish that their act of censorship did not stem simply from fear of controversy, nor even from the view, proffered here, that the subject of

³⁴ See Board of Education v. Pico, 457 U.S. at 879 n.2 (Blackmun, J., concurring in part and concurring in the judgment) ("I find crucial the State's decision to single out an idea for disapproval and then deny access to it.").

teen pregnancy is inappropriate to the age and maturity of some potential readers. "[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." Tinker, 393 U.S. at 511. The school administration in the recent past has permitted, among others, newspaper articles about teen pregnancy, student dating, and teenage marriage, and singling out the interview with three students about teen pregnancy and the article on divorce's impact on children prohibits expression of particular views about subjects generally aired in the newspaper. Kuhlmeier, 607 F. Supp. at 1453 (noting list of past topics). Banning this story amounts to selection from among the viewpoints on the subject, and here the

administration removed from student access powerful descriptions of the day-to-day difficulties of teens facing pregnancy.³⁵

³⁵ See supra note 32 (citing Gertz v. Robert Welch, 418 U.S. 323, 339-40 (1974) (opinions, however pernicious, must be corrected with other ideas, not with censorship)). The importance of a dialogue among students cannot be ignored. The Harris poll of teenagers and their attitudes towards sex, supra note 13, indicates that rates of sexual activity are quite high: 25% of teens aged 14 to 15, and 51% aged 16 to 17, indicated that they had already had intercourse. Table 1-2. Yet of those teens who have had intercourse, only one third (33%) use birth control all of the time. Table 1-4.

In addition to the health problems associated with early sexual activity, there are related socioeconomic problems. and teenage pregnancy can be devastating to a woman's future. One picture of this is presented by high school completion rates. For women who had their first birth at age 15, 16, or 17, the combined completion rate is less than 50%; for those who wait until they are 18, the rate is 62%, and at 19, the rate is 77%. For those who avoid pregnancy during the teenage years, and have their first birth at 20 or older, the high school completion rate is 90%. Children's Defense Fund, Adolescent Pregnancy: Whose Problem Is It? 3 (January 1986).

The expertise of school officials regarding student' emotional and intellectual maturity cannot defend censorship that is otherwise unjustified, and the Court's comparative lack of knowledge about students' maturity cannot weaken the Constitutional vigilance against State curbs on private freedoms. This Court concluded in Barnette that, "[w]e cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. at 640. The Constitution prohibits unjustified censorship of the content of student speech, and in this the Court is expert, not the school administrators.

The school officials may not justify their censorship by relying on the special, legitimate governmental restrictions

against exposing minors to indecency or obscenity. Certainly, First Amendment jurisprudence recognizes an interest in protecting minors from exposure to obscene language. Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968). Obscenity and vulgarity are, however, far removed from discussions of pregnancy and the sexual activity that may lead to pregnancy. Failure to draw this distinction would leave young people ignorant about what leads to pregnancy, and too ashamed to ask about it. Obscene and lewd statements are beyond the kind of First Amendment protection guaranteed to information and viewpoints about issues central to public concern, such as teen pregnancy. In contrast, the newspaper story at issue here is pure speech, conveying information and

opinions about teen pregnancy and its effects on the lives of young people. These are matters of central public concern for teens and the story presented viewpoints about them: core protected speech is at issue here. As this Court was careful to note last Term in Fraser, sanctions against a student who delivered offensively lewd and indecent statements "were unrelated to any political viewpoint." Fraser, 106 S.Ct. at 3166. The Fraser decision is thus inapposite to the core protected speech presented in the story about Hazelwood East students who became pregnant. Here, there is obvious informational content and not vulgarity, as there was in Fraser. And here, there is discussion of a significant public issue which has a profound impact on the lives of the teen readers.

The content and viewpoint based censorship manifested here is precisely the kind of unbounded governmental action extinguishing individual expression that the Constitution forbids. The censorship decision was made under unusual and hasty circumstances, as the principal read the newspaper galleys for the first time while speaking by telephone with the substitute faculty advisor for the paper and while mistakenly believing that this substitute needed an immediate decision. Just such moments of incaution and irregularity by government officials pose the most serious risks to the delicate balance in the schools demanded by the First Amendment. To approve of the petitioners' act of censorship, as the District Court did, because they "demonstrate[d] that there was a reasonable basis for the action taken, based on the facts before them," Kuhlmeier,

607 F. Supp. at 1466, is to so water down the commands of the First Amendment as to invite regular incaution and disregard of First Amendment rights by school officials. There is no reason here to depart from the well-established Constitutional commitment to demand more than a reasonable basis for suppression of speech and for suppression of particular content and viewpoints. Widmar, 454 U.S. 263 (1981). "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker, 393 U.S. at 508.

III. THERE IS NO EVIDENCE THAT THE SPEECH AT ISSUE HERE RISKS DISRUPTION OF THE WORK OF THE SCHOOL OR INVASION OF THE RIGHTS OF OTHER STUDENTS

Petitioners make no claim and offer no evidence that the censored articles risked material or substantial disruption of the

operation of the school, which is required by Tinker before student expression may be suppressed. 393 U.S. at 509.³⁶ The only claim that applies the standards of Tinker³⁷ is based on what the Tinker Court called the "collision with the rights of other students to be secure and to be let alone." Id. at 508. Petitioner's specula-

³⁶ Petitioners have conceded, as they must, that this case does not present any facts relevant to a material disruption or substantial disorder of the school operations. The Court of Appeals found that the school district presented no evidence on this score, and noted that it was not argued on appeal. Kuhlmeier, 795 F.2d at 1375.

³⁷ Petitioners' arguments that stories about pregnancy and divorce are inappropriate for high school students and that some students may not be mature enough to read them register no reasons recognized in Tinker as adequate justifications for suppressing student expression. Petitioners' claim that the teen pregnancy story might imply school approval of the views or behaviors reported in it demonstrates an impermissible intolerance for points of view beyond those of the school administrators. See supra notes 31-35 and accompanying text.

tive fear of a potential invasion of privacy falls far short of demonstrating a basis for abrogating respondents' First Amendment rights.

The only action that could have hypothetically been brought by the girls interviewed would have been a tort suit alleging invasion of privacy for the public disclosure of a private fact. Tinker's invasion test, however, has not applied to torts; rather, it affords protection of student freedoms in school, like not having one's education interrupted by a demonstration. Even if the risk of tort suits is included, contemplated as a measure of invading the rights of others, this justification for undermining free expression should be limited to torts where there is little doubt about liability. A suit for an invasion of privacy based on the facts of this case would be simply

untenable. In any case, there can never be a prior restraint like the censorship where there is an adequate remedy at law.³⁸

Moreover, petitioners' invasion of privacy theory seems to be a post hoc rationale, appearing long after the censorship and after other reasons had been given by the principal for his act of censorship. On May 13, 1983, the principal met with the staff of the newspaper to report his reasons for the censorship, and he informed the students that the articles were censored "because they were 'too sensitive' for our 'immature audience of readers.'" Kuhlmeier, 607 F. Supp. at 1459 (Finding of Fact No. 14).³⁹ On May 16,

³⁸ Matter of Providence Journal Co., 809 F.2d 63, 71 (1st Cir. 1986).

³⁹ The principal did not mention budget or page limits as a rationale for his acts. Kuhlmeier, 607 F. Supp. at 1459 (Finding of Fact No. 14).

1983, a notice was posted in the journalism room at Hazelwood East which stated, among other things, that the content of some articles was personal, highly sensitive, and totally unnecessary. Id. The petitioners denied that they caused this notice to be posted, but they admitted that it corresponded with public statements made by petitioners Reynolds and Dr. Lawson. Id. Mr. Reynolds met with the Spectrum staff that same day and he stated that "the stories were deleted because they were inappropriate, personal, sensitive, and unsuitable for the newspaper." Id. Dr. Lawson and Mr. Reynolds were quoted in the press as stating that the articles were censored because of the personal, sensitive, and unnecessary nature of the information. Id. at 1459-60. At trial, the principal offered a new reason for his act of censorship, along with the previous

reasons: he said he "was concerned that the girls had been described to the point where they could be identified by their peers." Id. at 1460 (Finding of Fact No. 15). The District Court found that the teens who were interviewed were told in advance that the information they gave would be published in the school newspaper, and that pseudonyms would be used. Id. at 1458 (Finding of Fact No. 13). This fact, and not the District Court's legal conclusion, is determinative here: the interviewed teens consented to the publication of their stories and to the use of pseudonyms.

The Court of Appeals found no basis for any invasion of privacy claim, Kuhlmeier, 795 F.2d at 1376, and the legal requirements for such a suit were clearly not met by the information in the censored articles. A tort suit for the public disclosure of a private fact requires that

(1) the disclosure must be public, and not private; (2) the facts must be private ones, and not public; (3) the matter made public must be one which would be highly offensive and objectionable to a reasonable person; and (4) the public must not have a legitimate interest in having the information available. Restatement (Second) of Torts sec. 652D (1977); Prosser & Keeton, The Law of Torts sec. 117 (1984); see also American Bar Association, Standards Relating to Schools and Education 84 (1982) (restriction of student expression permitted when it violates "another person's right of privacy by publicly exposing details of such person's life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities....").

The article gave no identification of the pregnant teens, and they themselves

consented to the story. The three teens interviewed about their experiences with pregnancy and its impact on their lives agreed to be subjects for the newspaper story, and certainly they could not, and would not, claim that their privacy had been invaded by their own disclosure of information. They knew the possibility that some personal details might have made them recognizable to some readers, and they chose to tell their stories in the hopes of helping other students. More importantly, there can be no invasion of privacy where the alleged victim consented to the disclosure of information. Restatement (Second) of Torts sec. 652F.⁴⁰

⁴⁰ Under the Restatement this tort is a personal one and an action can be brought only by the victim. Restatement (Second) of Torts sec. 652I. There is no reason to suggest that the girls' parents or the fathers suffered any privacy invasion nor that the privacy rights of parents or others amount to the "rights of others"

It is unlikely that either the facts of the teens' pregnancies disclosed in the first story or of the divorce of the student's parents in the other story⁴¹ were unknown to others in the school community. In addition, the mere fact of pregnancy is something that is not readily hidden. See Restatement (Second) of Torts sec. 652D, Illustration 15 (reporting that a twelve year old girl gave birth does not give rise to an invasion of privacy). It is also inconceivable that these matters would be highly offensive and objectionable to individuals who willingly gave such information. In fact, no action has been brought by the students or anyone else,

requiring protection under Tinker.

⁴¹ Of course, the advisor had already deleted the name of the student interviewed for the divorce article, Kuhlmeier, 607 F. Supp. at 1458-59, so there would have been anonymity for the divorce article as well.

which is powerful evidence that there was no reasonable risk of such suits before the censorship. Such information is not uncommon in a school community where both teen pregnancy and parents' divorces are well known and the subject of common discussion.⁴² Tinker requires more than "undifferentiated fear or apprehension of disturbance" to overcome the right to

⁴² The Court of Appeals noted that the divorce story was nothing more than an anecdotal treatment of the subject of divorce." Kuhlmeier, 795 F.2d at 1376.

As with the stories of the three pregnant teens, the story about divorce's impact was given voluntarily to the student reporter. As the Court of Appeals noted, the student's name was deleted so that there could be no identification of students or parents. Kuhlmeier, 795 F.2d at 1376. Therefore, there never could have been a suit for the public disclosure of a private fact. Any disclosures made in the article offer no basis for embarrassment or high offense to those involved; more importantly, such facts are far from private: family, friends, neighbors, guidance counselors, and teachers know the details, and they are often a matter of public record.

freedom of expression, Tinker, 393 U.S. at 508, and yet that is all the petitioners offer here. "Certainly where there is no finding and no showing that engaging in of [sic] the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." Tinker, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d at 749).

Finally, there are legitimate student interests in learning about the effects of pregnancy and the impact of divorce on other students so that students may better learn how to deal with their own problems as well as those of others. Suppressing such speech to protect the female students among the potential readers from sensitive material reinforces faulty images of those students as fragile and too immature to

handle the very information that may be necessary for them to deal with the actual risks of pregnancy in their lives. Silencing discussion about teen pregnancy is no way to protect teenage students, who need accurate information about the real risks and serious consequences of teen pregnancy.

Petitioners have provided no reason to abandon the framework established by Tinker for recognizing and enforcing the significant First Amendment interests of students in public high schools, and their censorship of the student newspaper wrongly deprived the school community of information and viewpoints of critical public concern with no evidence of risks of material disruption or violations of the rights of others as required by Tinker. Even if, for example, the expression of student views were entitled to no more protection than mere commercial speech, the

asserted governmental interest in regulating such speech must still be substantial, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), and nothing substantial has been offered here by petitioners. They have asserted only a generalized fear that the rights of others might be violated by news stories about pregnancy and divorce, although the information was volunteered by the students they directly concern. No privacy rights are at issue here, nor disruption of the operation of the school, as the actual experience at the school after the censored articles were informally but widely distributed makes clear.

It cannot be enough to justify censoring information and views about teenage pregnancy and other important issues that controversy may arise, that the school may disagree with student views, or

that individual student readers may be immature. Teen pregnancy happens to teenagers. Their lives and their choices are the ones that are on the line. If there is any kind of communication that reaches teens, it is from teens speaking about their own experiences. If there is any subject for discussion today that school administrators must be committed to promoting -- not suppressing --, it is the potential link between teen sexual activity and both pregnancy and disease. News about the experiences of other teens must circulate to inform teens of the risks they face.⁴³

⁴³ Commentators agree that broad based discussion and education on the issues of teenage sex and pregnancy will help alleviate the problems associated with teenage pregnancy. See, e.g., Jones et al., supra note 17, at 61; Children's Defense Fund, supra note 15; remarks of Surgeon General Koop, supra note 19 and accompanying text; City Volunteer Corps; supra note 15; Wolfgang & Cohen, supra note 16, at 97-103; Furstenberg & Brooks-Gunn, supra note 16, at 22-28.

Our Constitution, and the rights of our students demand no less.

CONCLUSION

For the foregoing reasons, the Amici Curiae urge that this Court rule in favor of the respondents in this matter.

Respectfully submitted,

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Date: May 26, 1987

Professor Minow and the NOW LDEF acknowledge and thank Eric Sarner, Harvard Law School, J.D. 1987, and Michele Cotton, New York University Law School, J.D. 1988, for their work on this brief.

(i) Motion of NOW Legal Defense and Education Fund, National Organization for Women, Children's Defense Fund, Equal Rights Advocates, Inc., Women's Equity Action League, Women's Law Project for Leave to File as Amici Curiae on Behalf of Respondents

Pursuant to Rule 36.3 of the Rules of this Court, the NOW Legal Defense and Education Fund, the National Organization for Women, Children's Defense Fund, Equal Rights Advocates, Inc., Women's Equity Action League, and Women's Law Project seek the permission of this Court for leave to file as amici curiae in support of the respondents in this case. The brief of amici curiae is submitted herewith.

The grounds for granting the motion for leave are as follows:

1. The amici curiae requested permission from the Petitioners and Respondents to file a Brief of Amici Curiae in the above captioned case. Letters requesting such

consent were mailed to petitioners' counsel, Robert Baine, 225 So. Meramec, 10th Fl., St. Louis, MO 63105, and respondents' counsel, Leslie Edwards, 403 N. Jackson, St. Louis, MO 63130, on March 13, 1987. Leslie Edwards, counsel for respondents, gave consent by a letter dated March 24, 1987, which is attached. Robert Baine, counsel for petitioners, did not respond to our written request or to our several telephone contacts made in follow up to our written request. Ms. Edwards informed us that Mr. Baine was withholding consent for any amicus briefs submitted on behalf of respondents.

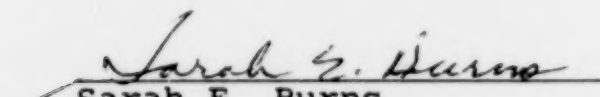
2. Amici curiae are deeply concerned that communication and information about teen pregnancy be available to girls and women, who disproportionately bear the burdens of early pregnancy. The article on teen

pregnancy censored by the Hazelwood East High School principal represents an effective educational tool teaching other teens about the connection between early unprotected sex and teen pregnancy, and the emotional, financial, and educational stresses teen pregnancy creates. This core informational speech is vital in helping girls and women make the personal choices that will affect the rest of their lives.

3. Amici curiae request that this Court grant permission for leave to file the attached Brief of Amici Curiae, because it focuses on the importance of this speech on teen pregnancy. The First Amendment issues are examined in the context of this important concern, thus presenting a perspective not taken by the parties or other amici. The brief explains how First Amendment interests are served by the

dissemination of such speech as well as the
policy concerns supporting protection of
speech in this area.

Respectfully submitted,


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Counsel of Record for
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Date: May 26, 1987

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March 24, 1987

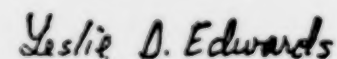
Sarah E. Burns
Legal Director
NOW Legal Defense & Education Fund
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RE: Hazelwood School District v. Kuhlmeier, No. 86-836

Dear Ms. Burns:

Please be advised that I give my consent to the filing of
an amicus brief by NOW Legal Defense and Education Fund
in the above-captioned cause.

Sincerely,



Leslie D. Edwards

LDE:kd

(iii) Interest of Amici Curiae

The NOW Legal Defense and Education Fund (NOW LDEF) is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization. Equal educational opportunity for women and women's access to the media are central issues for NOW LDEF. The Project on Equal Education Rights of NOW LDEF has carried forward several programs designed to improve education for young women and girls on issues of teenage pregnancy. The Women's Media Project of NOW LDEF is dedicated to ensuring that information concerning issues critical to women's lives, including the impact of unwanted pregnancy

on a young woman's life, is available through the media.

The National Organization for Women (NOW) is a national membership organization of approximately 150,000 women and men in more than 750 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including access to information on birth control and abortion.

The Children's Defense Fund (CDF) is a national, public charity representing and providing advocacy on behalf of low-income, minority and handicapped children. In 1983, CDF began a major program initiative to prevent teen pregnancy and to alleviate the range of problems facing adolescent and female-headed households. This ongoing effort includes demographic research,

policy analysis, public education, and a national media campaign on teen pregnancy directed at teens and adults.

Equal Rights Advocates, Inc. (ERA) is a San Francisco based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. ERA also believes that in order to make constitutionally protected decisions about parenthood, women of all ages must have access to accurate and relevant information.

The Women's Equity Action League (WEAL) is a national membership organiza-

tion committed to the economic development and advancement of all women. WEAL supports both reproductive freedom and unhindered access to information about women's reproductive lives as rights for all women, and recognizes those rights as intimately tied to the capacity of women to gain economic security.

Women's Law Project is a non-profit, public interest law firm which seeks to advance the legal status of women through litigation, public education, and individual counseling. During the past fourteen years its activities both in Pennsylvania and nationally have included work in the fields of health, reproductive freedom, employment, domestic relations, housing, insurance, credit, education and constitutional privacy.

AMICUS CURIAE

BRIEF

MOTION FILED
MAY 26 1987

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, et al.,

Petitioners,

—vs.—

CATHY KUHLMIEER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**Motion For Leave To File Brief Of *Amici Curiae* And
Annexed Brief Of The Planned Parenthood Federation
Of America, Inc., The National Board Of The Young
Women's Christian Association Of The U.S.A., The
Center For Population Options, The Society For
Adolescent Medicine, The Sex Education And
Information Council Of The United States, The
Newspaper Guild, And The Professional Rights
Committee Of The American Society Of Journalists And
Authors, In Support Of Respondents.**

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20/9/86

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-836

HAZELWOOD SCHOOL DISTRICT, et al.,
Petitioners,

—vs.—

CATHY KUHLMEIER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion For Leave To File Brief Of *Amici Curiae* The Planned Parenthood Federation Of America, Inc., The National Board Of The Young Women's Christian Association Of The U.S.A., The Center For Population Options, The Society For Adolescent Medicine, The Sex Education And Information Council Of The United States, The Newspaper Guild, And The Professional Rights Committee Of The American Society Of Journalists And Authors.

The undersigned, as counsel for the Planned Parenthood Federation of America, Inc., the National Board of the Young Women's Christian Association of the U.S.A., the Center for Population Options, the Society for Adolescent Medicine, the Sex Education and Information Council of the United States, the Newspaper Guild, and the Professional Rights Committee of the American Society of Journalists and Authors, respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Interests of *Amici Curiae*

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc. (PPFA) is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. It is the leading voluntary public health organization in the field of family planning.

PPFA has 183 affiliates in 44 states and the District of Columbia, all of them separately incorporated not-for-profit entities. These affiliates operate 786 family planning clinics offering services to the public. Most affiliates offer medical services and 47 include abortion services as part of their program. Most affiliates which do not perform abortions offer pregnancy counseling and referral. All affiliates offer educational and informational services in voluntary fertility control.

PPFA provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education, and education for marriage and parenthood. Affiliates offering medical services function under strict medical standards promulgated by the National Medical Committee, a committee of leading health care professionals from around the country, the majority of whom are physicians.

PPFA is committed to providing accurate family planning information and education to the public, and believes that such information should be accessible to everyone, including the adolescent population. Many PPFA affiliates are teaching and training centers for physicians, nurses, teachers and social workers, and some also train teenagers to be peer educators and counselors in local high schools and other community settings.

The National Board of the Young Women's Christian Association of the U.S.A.

The Young Women's Christian Association of the U.S.A. (YWCA) is a non-profit organization representing over two million women and girls. The YWCA supports measures to

assure the right to express unpopular ideas in accordance with the guarantees of the United States Constitution. The YWCA also supports assistance to schools in accepting responsibility for providing sound education on human sexuality.

The Center for Population Options

The Center for Population Options (CPO) is a national organization which works to enhance opportunities for young people in the decision-making areas of their lives: continuing their education, planning their families, obtaining needed health and social services, and obtaining productive employment. CPO is dedicated to ensuring teens' access to accurate information and services concerning reproductive health choices, including abortion, as a fundamental right of every person of child-bearing age.

The Society for Adolescent Medicine

The Society for Adolescent Medicine is a national organization of health care providers to the adolescent population. It consists of over 900 active members, all of whom are physicians and other health care professionals.

The Sex Education and Information Council of the United States

The Sex Education and Information Council of the United States (SEICUS) is a private non-profit educational organization established in 1964 to promote healthy sexuality as an integral part of human life. SEICUS believes that accurate information, comprehensive education, and positive attitudes toward sexuality enhance physical and mental health and promote greater communication and caring within our society. SEICUS supports each individual's right to obtain knowledge, make decisions and develop non-exploitative sexual choices.

The Newspaper Guild

The Newspaper Guild is a labor union representing some 40,000 employees of newspapers, magazines, wire services and

related enterprises in the United States and Canada, and has been active in protecting the First Amendment rights of its members and all Americans, including the student press.

The American Society of Journalists and Authors, Professional Rights Committee

The American Society of Journalists and Authors (ASJA) is a nationwide organization of professional writers of nonfiction. All ASJA Members—more than 700 independent freelance writers of magazine articles, trade books, and many other forms of nonfiction writing—have met the Society's exacting standards of professional achievement. The ASJA's Professional Rights Committee, which is concerned with preserving the independent writer's rights and freedoms, launched its campaign to combat the rising incidence of censorship in the United States in September, 1981, and continues today its fight to protect the freedom of speech and of the press guaranteed by the First Amendment to the United States Constitution.

Facts and Questions of Law Not Addressed by the Parties

Amici curiae wish to submit this brief in support of the respondent students because of their belief that the censorship of articles in the Hazelwood student newspaper, *Spectrum*, unconstitutionally infringes upon the free speech rights of the students. There are certain facts which have not been addressed by either of the parties and which *amici* believe would be helpful to this Court in reviewing this case. Additionally, there is a question of law which has not been briefed by the parties.

Amici intend to show that the school district's censorship is particularly egregious because the censored material involves peer-to-peer communication on issues of central concern to the adolescent population. *Amici* will demonstrate the unique value of peer communication in the educational process and will also show that adolescents are more likely to turn to their peers than to any other single source for information about many personal matters, including issues related to sex. Com-

munication on these issues, particularly between peers, is especially important given the high rate of teenage pregnancy in today's society.

Additionally, *amici* will argue that the special constitutional protection accorded the subject matter of many of the censored articles necessitates a high level of scrutiny of the purported reasons for the school's censorship. This Court's previous decisions have recognized that speech relating to birth control, abortion, and reproductive health, such as that banned by the school district in this case, pertains to constitutional interests and cannot be suppressed in the absence of a genuinely compelling state interest.

Consent of Parties to Filing of Brief

Amici have sought the consent of the parties to the filing of this brief. Counsel for Respondents has consented. Counsel of record for Petitioners has refused consent.

Respectfully submitted,

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This brief is submitted by the above named *amici curiae* conditionally upon the granting of the attached motion for leave to file.

SUMMARY OF ARGUMENT

Amici curiae submit this brief in support of respondents Cathy Kuhlmeier, Leslie Smart, and Lee Ann Tippett. *Amici* urge this Court to affirm the holding of the United States Court of Appeals for the Eighth Circuit that petitioner-school district unconstitutionally infringed upon students' First Amendment rights in preventing the publication of several articles in the school newspaper.

The censored articles, many of which relate to pregnancy, birth control and other reproductive health issues, should be heard by the student audience the newspaper is designed to reach. Studies have shown that the type of communication censored, peer-to-peer relation of problems of common concern, has a special value in the educational process. Teens are more inclined to listen to and learn from their peers when seeking information on such subjects as sexuality, pregnancy, and birth control.

The subject matter of these articles—reproductive health and related issues—also pertains to constitutional interests which this Court has held enjoy special constitutional protection. Therefore, the school district's purported reasons for censoring two full pages of the school newspaper should be subject to the most rigid constitutional scrutiny. Given the high rate of teenage pregnancy in this country, no subject could be more appropriate or compelling for today's teens, particularly when communicated by students to other students in their high school's newspaper, a forum specifically designated by the school for student expression.

ARGUMENT

I. THE SCHOOL DISTRICT'S CENSORSHIP OF ARTICLES IN THE STUDENT NEWSPAPER VIOLATED STUDENTS' FIRST AMENDMENT RIGHTS

The censorship of student-written articles in Hazelwood East High School's student newspaper, *Spectrum*, unconstitutionally impinges upon the free speech rights of students and on the educational process itself. By preventing the publication of several articles, including ones which detailed high school students' personal experiences, school administrators have cut off the flow of vital information to the teenage audience the student newspaper is designed to reach.

The allegedly objectionable articles, which were to be published in the May 13, 1983 edition of *Spectrum*, gave certain students an opportunity to tell, in their own words, the story of

their personal experiences with pregnancy and divorce. One of the articles recounted the stories of three high school girls' experiences with pregnancy, including their families' reactions, their relationship with the baby's father, the use of birth control, the impact of a child on their financial security, and issues related to continuation of their education. The other article gave several students' perspectives on divorce within their own families and its impact on them as children of divorced parents.¹

Although petitioners claim that only these articles were objectionable, because of the possibility that the subjects could be identified, they proceeded to excise two whole pages of the newspaper. The other articles on the censored pages dealt with such subjects as teenage marriage and divorce, sexuality, pregnancy, abortion, runaways and the "squeal law," although they were general news articles rather than personalized accounts of Hazelwood students' first-hand experiences.

Not only is the subject matter of the communication particularly compelling given the problem of teenage pregnancy in this country, but the type of communication, peer-to-peer relation of problems of common concern, is an important part of adolescent education. Moreover, because of the constitutionally protected nature of the articles, which discuss reproductive health issues, the state's purported reasons for censoring these articles should be subject to the most rigid constitutional scrutiny.²

¹ Pseudonyms were used for the girls in the pregnancy article and the name of the student originally identified in the divorce article was deleted on the copy sent to the printer. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1371 (8th Cir. 1986).

² See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977), in which this Court rejected the state's arguments that contraceptive advertisements would be offensive and embarrassing to those who viewed them and would legitimize sexual activity of young people, stating that "these are classically not justifications validating the suppression of expression protected by the First Amendment."

A. Peer Communication Is A Vital Part Of The Adolescent's Education

Peer-to-peer communication is an integral part of adolescent life and learning. It is during adolescence that children struggling to define their role in the world increasingly look to their peers for support, information, and understanding.³ As they grow older, adolescents are more and more likely to turn to their peers for information on a wide variety of social and personal concerns.⁴

It is with their peers that adolescents fulfill their need for closeness, intimately share experiences and problems, and are able to find sympathy and understanding.⁵ The peer group may also assist adolescents in evaluating themselves from varying perspectives and plays an important part in the adolescent's development of skills and information.⁶

Issues relating to sex is one of the areas in which adolescents constitute the most important source of information for their peers. Studies have shown that adolescents look to their peers more than any other single source for information relating to this topic.⁷ Peers thus represent an important resource in the educational process. As one author has written, "not only is peer education a potentially powerful educational strategy, but

³ See, e.g., F.P. Rice, *The Adolescent: Development, Relationships and Culture* 345-352 (1987); Hoffmar, *Moral Development in Adolescence*, in *Handbook of Adolescent Psychology* 326-328 (J. Adelson ed. 1980); A.T. Jersild, J.S. Brooks & D.W. Brooks, *The Psychology of Adolescence* 348-357 (3d ed. 1978) [hereinafter cited as A.T. Jersild].

⁴ Young & Ferguson, *Developmental Changes through Adolescence in the Spontaneous Nomination of Reference Groups as a Function of Decision Content*, 8 *Journal of Youth and Adolescence* 239-252 (1979).

⁵ See K.B. Garrison, *Psychology of Adolescence* 206 (7th ed. 1975); A.T. Jersild, *supra* note 3, at 351-353.

⁶ See A.T. Jersild, *supra* note 3, at 352.

⁷ H.D. Thornburg, *Adolescent Sources of Information on Sex*, 51 *Journal of School Health* 274-277 (1981); S.M. Davis & M.B. Harris, *Sexual Knowledge, Sexual Interests, and Sources of Sexual Information of Rural and Urban Adolescents From Three Cultures*, 17 *Adolescence* 471-492 (1982).

it already takes place constantly on an informal basis among most people" as they exchange ideas and information.⁸

Amicus curiae Planned Parenthood Federation of America also recognizes the special value of peer communication in the adolescent's life. Currently, forty-seven Planned Parenthood clinics operate programs that train and utilize adolescent peer educators in classroom situations as well as more informal settings. Peer educators in these programs provide information on a range of subjects, including birth control, reproductive health care and other issues that impact particularly on teens, such as drinking and drug use, parental conflicts, divorce, and suicide. Regardless of the particular educational approach, whether formalized teaching or informal interaction, the premise of these programs is that teens are more likely to listen to, learn from and interact with other teens than with adults.

This Court has also recognized the importance of peer communication and its unique value in the education of high school students. In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), this Court held that a regulation prohibiting students from wearing arm bands in school to protest the war in Vietnam violated the First Amendment right of students to express their beliefs and make their views known to other students.

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the

⁸ P. Finn, *Institutionalizing Peer Education in the Health Education Classroom*, 51 *Journal of School Health* 91-95 (1981). See also L.L. Perry, K. Klepp, A. Halper, K.G. Hawkins, & D.M. Murray, *A Process Evaluation Study of Peer Leaders in Health Education*, 56 *Journal of School Health* 62-67 (1986).

authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others (emphasis added).

Id. at 512-13 (citations omitted).

Here too, students' First Amendment rights have been violated by the school's censorship of their speech in the school newspaper. The articles that were censored because of the school administrators' objections were accounts of high school students' experiences and problems with certain real-life issues that affect many of today's teenagers. Publication of the articles in the school newspaper would have given other students a unique opportunity to read about their peers' experiences and evaluate the impact that pregnancy or divorce would have on their own lives. These articles, which were written by students for students, in a forum designated by the school district for student expression, are surely as integral a part of the educational process as was the wearing of arm bands by students in the *Tinker* case.

B. The Subject Matter Of Some Of The Censored Articles Enjoys Special Protection Under The Constitution

Although school administrators supposedly objected to only two of the articles in the school newspaper, two full pages containing several other articles were deleted. As the court of appeals held, the school's claimed inability to delay publication did not justify such broad censorship. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1375 (8th Cir. 1986).⁹

The deletion of two full pages of newspaper text, much of which discussed issues of adolescent sexuality, pregnancy, contraception, and abortion, and included students' accounts of

⁹ The court of appeals noted that there was no evidence in the record of a "specific timetable for publication of that or any other issue," and the school had not cited any other reason for its inability to publish the pages of text with only the two articles excised. *Kuhlmeier*, 795 F.2d at 1375.

their pregnancies,¹⁰ is particularly troublesome because this Court has held repeatedly that this kind of information enjoys special constitutional protection.

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court held that the state cannot ban the advertisement of abortion services in newspapers. Citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), the *Bigelow* Court found that because "the activity advertised pertained to constitutional interests," the newspaper publisher's "First Amendment interests coincided with the constitutional interests of the general public." *Bigelow*, 421 U.S. at 822.

In *Carey v. Population Services International*, 431 U.S. 678 (1977), this Court struck down a statute that banned the advertising or display of contraceptives, holding that, in addition to the "substantial individual and societal interests" in the free flow of commercial information, *id.* at 700, the particular information suppressed by the statute "related to activity with which at least in some respects, the State could not interfere." *Id.* at 701 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 760 (1976)). Moreover, the *Carey* Court invalidated that part of the statute which prohibited the sale or distribution of contraceptives to minors under sixteen, holding that it violated a minor's constitutionally protected right to privacy. *Id.* at 692-96. See also *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976).

More recently, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), this Court invalidated a federal statute which prohibited the mailing of unsolicited advertisements for contraceptives. The statute was held violative of the First Amendment, in part because it impeded the flow of truthful

¹⁰ One half of the censored pages discussed issues relating to teen pregnancy, with articles written by three different students. One article was on teenage sexuality, birth control, abortion and childbearing; one article described the so-called "squeal rule," which would have required federally funded clinics to notify the parents of minors who received contraceptives; and one was the allegedly objectionable article which recounted teenage girls' personal experiences with pregnancy.

information bearing on parents' ability to discuss birth control with their children and to make informed decisions in this area. *Id.* at 74-75. The *Bolger* Court also noted the First Amendment right of minors to receive this information, citing the "pressing need" of adolescents for information on contraception, especially in light of the high rate of teen pregnancy. *Id.* at 74 n.30.

These decisions demonstrate the special constitutional protection that is accorded speech such as that censored in Hazelwood East school's student newspaper.¹¹ The school administrators' inability to provide any credible explanation for their broad censorship of entire pages of the newspaper¹² makes it plain that they have failed to satisfy the compelling state interest test or even the *Tinker* standard of material and substantial interference with school work, discipline or the rights of others. See *Kuhlmeier*, 795 F.2d at 1374-76. Clearly, any censorship of this speech, if based on school administrators' discomfort with or disapproval of the subject matter, or their perception that others might be offended by it, would be unconstitutional. *Carey v. Population Services International*, 431 U.S. at 701.

C. Students' First Amendment Rights To Communicate Through A Newspaper That Is A Public Forum Must Be Zealously Guarded Against Wholesale Censorship Undertaken In The Guise of Furthering Educational Goals

Since students chose *Spectrum's* staff members, determined the content of its articles, and wrote the articles, and since it was the intention of the school district that *Spectrum* be "operated as a conduit for student viewpoint," *Kuhlmeier*, 795 F.2d at 1372, the conclusion of the Eighth Circuit Court of

¹¹ See *supra* note 10.

¹² See *supra* note 9; *Kuhlmeier*, 795 F.2d at 1375.

Appeals that *Spectrum* is a public forum is inescapable.¹³ As with the school library in *Board of Education v. Pico*, 457 U.S. 853 (1982), the "special characteristics" of a student newspaper make it an "environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 868. See also *San Diego Committee Against Registration and the Draft (CARD) v. Governing Board*, 790 F.2d 1471, 1476-78 (9th Cir. 1986).

The district court's recognition of the role of *Spectrum* in the journalism curriculum cannot be a constitutional justification for the blanket censorship that occurred here. While faculty editing of student articles may serve the legitimate educational goal of teaching students the mechanics and ethics of responsible journalism, school officials cannot use their editorial control to censor particular viewpoints or ideas with which they disagree.¹⁴ Content-based restrictions on speech in a forum designated for student expression must be narrowly drawn to serve a compelling state interest. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981); *CARD v. Governing Board*, 790 F.2d at 1474-76. Any lesser constitutional standard, such as the "reasonableness" test suggested by the district court, see *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1466 (E.D. Mo. 1985), would abandon protection of the students' First Amendment

¹³ Although the court of appeals refers to the student newspaper as a public forum, the fact that the school permitted students to write the articles makes it clear that *Spectrum's* article pages are a designated or limited public forum open only to students. See *San Diego Committee Against Registration and the Draft (CARD) v. Governing Board*, 790 F.2d 1471, 1476 (9th Cir. 1986).

¹⁴ The court of appeals found that "there is no evidence in [the] record which supports the administrators' fear that the pregnancy case study would create the impression that the school endorsed the sexual norms of the students interviewed Nor is there evidence in [the] record to support the administrators' view that the article was inappropriate for publication in *Spectrum*, given the age and immaturity of some of its readers. Unfortunately teenage pregnancy is a problem in nearly every high school in the United States, including Hazelwood East." 795 F.2d at 1375.

rights to the "absolute discretion" of school officials that was rejected by this Court in *Pico*.

Students' accounts of their pregnancies, as well as articles relating to teenage sexuality, contraception and abortion, should be heard by other students, given the high rate of pregnancy in the adolescent population noted by this Court, the protected nature of most of the censored articles, and the demonstrated educational value of peer communication. While school officials may have been justified in their desire to preserve the anonymity of the subjects of two articles in the newspaper, see *Kuhlmeier*, 607 F. Supp. at 1466, the overbroad censorship that occurred in this case was not narrowly tailored to serve only that interest. In totally cutting off the flow of vital information to a high school audience, the school administrators violated their students' First Amendment rights to speak and to receive information in a forum designated for student use.

CONCLUSION

For the reasons stated in this brief, *amici* respectfully urge this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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CURIAE AND BRIEF *AMICUS CURIAE* OF THE
AMERICAN CIVIL LIBERTIES UNION AND THE
ACLU OF EASTERN MISSOURI IN
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ACLU OF EASTERN MISSOURI IN SUPPORT OF
RESPONDENTS.

Pursuant to Supreme Court Rule 36.3, the
American Civil Liberties Union ("ACLU") and
the American Civil Liberties Union of Eastern
Missouri ("ACLU of Eastern Missouri")
respectfully move for leave to file the
attached Brief Amici Curiae in support of

respondents. Neither party has consented to the filing of this brief.

The ACLU is a nationwide, nonpartisan civil liberties organization comprised of more than 250,000 members. The ACLU of Eastern Missouri is one of its state affiliates. The ACLU and its affiliates have long been devoted to the protection and enhancement of fundamental liberties and basic civil rights. In particular the ACLU has long been active in defending the constitutional rights of high school students, including free speech rights. For example, the ACLU and its affiliates represented the student litigants in Bethel School District v. Fraser, 92 L.Ed.2d 549 (1986); Board of Education v. Pico, 457 U.S. 853 (1982); and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). In addition, the ACLU and its affiliates have participated both directly and as amicus curiae in numerous

students' rights cases throughout the nation.

The ACLU of Eastern Missouri originally provided representation to these respondents in the United States District Court for the Eastern District of Missouri. In the United States Court of Appeals for the Eighth Circuit the ACLU of Eastern Missouri filed a brief and participated in oral argument solely on the issue of the denial of a jury trial, which issue has not been raised before this Court. All connection between the ACLU of Eastern Missouri and the respondents has been severed since this matter was brought to this Court. Neither the ACLU nor its affiliate have had any involvement in the preparation of respondents' brief in opposition to certiorari or their brief on the merits before this Court.

The ACLU and its affiliate nonetheless retain a strong institutional interest in the outcome of this case. They believe that

their long involvement in the issues of students' rights and the rights of mature minors will aid the Court in the resolution of this case. Amici argue concisely that the student speech at issue here, which is on topics of vital importance to teenagers, is precisely the sort of speech that the First Amendment is intended to protect. Amici demonstrate that the censorship that took place here was both exceedingly overbroad and unrelated to curricular decisions. Amici also explain that this censorship is inconsistent with this Court's standards under Tinker or this Court's public forum cases.

Amici pray that this motion for leave to file is granted so that they may bring their experience to bear upon the important questions presented by this case.

Respectfully submitted,

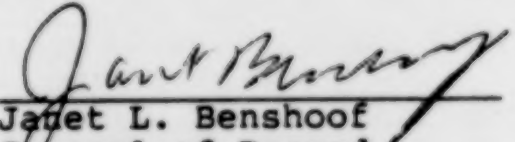

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INTEREST OF AMICI

The interest of amici is fully set out in the Motion for Leave to file Brief Amici Curiae.

STATEMENT OF THE CASE

Spectrum is the only student newspaper of Hazelwood East High School in St. Louis County, Missouri. Any student in the school can work on the newspaper, although it is largely produced by students enrolled in Journalism II. Students who choose to work on the newspaper receive instruction from the school on the meaning and application of the First Amendment and the role of press freedom in a democracy.

Over the years, Spectrum has carried articles proposed and written by students on topics of compelling importance to its high school readership, including articles on: the use of drugs and alcohol by students; race relations and desegregation; teen run-

aways, pregnancy, abortion, and dating; the death penalty and the draft.

In January 1983, the principal of Hazelwood East requested a copy of the galleys before each issue of Spectrum was published. The principal exercised no content control over the newspaper, however, until the censorship of two pages of the May 13 issue. That six-page issue was approved in final form by the Journalism II instructor; a replacement instructor then presented the galleys to the school principal, who "pulled" all of pages four and five.

In total, six censored articles were deleted, although the principal later testified that he only objected to two. The six censored stories addressed a series of issues vital to many teenagers. Four of the six articles contained interviews with Hazelwood East teachers or health officials, and included their advice to the students. One

story focused on the extent of teenage pregnancy in Missouri and the health, economic and educational problems arising out of teenage pregnancy and motherhood. A second, related story profiled three anonymous current and former Hazelwood East students about their teenage pregnancies.^{1/} A third article reported on the high divorce rate associated with teenage marriages and a fourth reviewed the terrible impact of divorce on children. Both divorce articles centered on an interview with the school's social science teacher. The fifth article reported the judicial invalidation of the so-called "squeal rule," which would have required parental notification for all teenagers

^{1/} The article containing interviews with the three pregnant students demonstrates the clinical reality of the lead, more statistically-based article. Two of the three were unmarried, at least one had already dropped out of school, and one explained the failure to use birth control because "I don't think I'd feel right taking them."

receiving birth control devices from federally-funded clinics. The sixth censored article was on teenage runaways and juvenile delinquents. This article not only informed teenagers in trouble where they could turn for help, but also featured interviews with a school guidance counselor and law enforcement officers.

The principal's decision to censor the six articles was made unilaterally and without any articulated reasons. He did not discuss his objections with the students or raise the possibility of editorial revisions. Indeed, he did not even inform them of his actions. The students first learned that two full pages of their newspaper had been cut when the paper was released.

Subsequently, the principal indicated that his concerns were limited to two articles: the profile of two students, one pregnant and one a mother, and one pregnant

teenager who had dropped out of school, and the article on children of divorced parents. Specifically, the principal feared that the pregnant students might be identified from their profiles although their names were withheld and the article had been written with their consent. He also objected to the use of a student's name and a quotation in the divorce story. Because he did not consult with anyone about his decision, he was unaware that the student's name had already been deleted. The principal had no objection to the other four articles; nevertheless, they were deleted because they were on the same page as the allegedly objectionable ones. The censored articles were later copied and distributed by some students without punishment and/or disruption.

SUMMARY OF ARGUMENT

Students retain free speech rights so long as their speech does not materially disrupt the school environment or invade the rights of others. Here, high school students attempted to publish in the high school newspaper several informative, serious articles on issues of vital importance to teenagers. These articles are precisely the sort of speech the First Amendment is intended to protect. The principal's censorship of this information both undermined the democratic values the school attempts to inculcate and deprived Hazelwood students of information essential to their daily decision-making.

A student newspaper occupies a unique status as a forum for student expression, particularly one such as Spectrum, which has long been open to expression on contemporary political issues of particular concern to teenagers. The production, publication, and

distribution of Spectrum is clearly "something more" than a curricular activity. Conversely, the arbitrary and overbroad censorship exercised by the principal in this case was not part of any curricular decision. Indeed, the only "educational lesson" imparted by the principal's action is that the First Amendment values taught in the journalism class are subordinate to the unfettered authority of school officials.

Whether this Court analyzes this case under Tinker alone or in conjunction with the public forum doctrine, the censorship that occurred here cannot be sustained. The school's long-standing policy and practice clearly demonstrate that Spectrum is an appropriate forum for this core protected speech. At a minimum, none of the school's excuses can justify the censorship of the four articles to which no objections were ever raised.

The censorship of the remaining two articles is also unsupportable. None of the harms identified in Tinker occurred; the mere speculation that students may later regret willingly discussing their pregnancy experiences hardly qualifies as an invasion of the rights of others. The other reasons put forth for this censorship are without basis in the record and would, if sustained, eviscerate student free speech rights.

In this year of the Constitution's Bicentennial, it would indeed be a "curious moral for the Nation's youth," New Jersey v. T.L.O., 469 U.S. 325, 386 (1985) (Stevens, J., concurring in part, dissenting in part), for this Court to uphold this arbitrary, overbroad censorship of student speech on matters so vital to their well-being.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS SPECTRUM'S RIGHT TO PUBLISH THE SIX CENSORED ARTICLES

It is simply too late in the day to claim that high school students lack free speech rights. As this Court has repeatedly recognized, secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969); see also T.L.O., 469 U.S. at 336. Students' rights to express their views, although not always coextensive with those of adults, may be curtailed only when "the school authorities ha[ve] reason to anticipate that the [speech] would substantially interfere with the work of the school or impinge upon the rights of other students." Tinker, 393 U.S. at 509.

These six articles, to be published in a student newspaper that has long been a forum for student speech, were on a range of serious topics within the core of the First Amendment and of obvious interest to the audience.^{2/} In the absence of any credible evidence of substantial or material harms caused by this speech, these articles were entitled to protection under the First Amendment, notwithstanding "the special circumstances of the school environment." Id. at 506.^{3/}

^{2/} See Bolger v. Youngs Drug Products Co., 463 U.S. 60, 68 (1983); Carey v. Population Services International, 431 U.S. 678, 700-01 & n.28 (1977).

^{3/} Petitioners' assertion that Tinker applies only to viewpoint discrimination is untenable. While the Court in Tinker found it "relevant" that the school board had not banned all political symbols, 393 U.S. at 510-11, it is inconceivable that the result turned on that point. The Court has never treated students' free speech rights as limited only to viewpoint discrimination. For example, in Bethel School District v. Fraser, 92 L.Ed.2d 549 (1986), the Court did not consider the student speech per se unprotected because the school's action was viewpoint neutral. Tinker provides the constitutional standards for analyzing [footnote cont'd]

A. The Articles at Issue Here
Involve Core First Amendment Speech
In A Unique Expressive Forum

The censored articles dealt in a serious and informative way with topics of particular interest and undeniable importance to adolescents. This is not a case of frivolous immature speech of marginal value. Unlike the nomination speech in Bethel School District v. Fraser, 478 U.S. ___, 92 L.Ed.2d 549 (1986), there is no claim that the articles were "offensively lewd and indecent." Id. at 560. Nor do these articles fall into any other category of unprotected speech such as libel, obscenity, or incitement to violence, even as those standards might be modified with respect to adolescents. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968).

In addition, high school students here are engaged in the enterprise of publishing a

student speech; applications may differ depending on whether or not regulation is viewpoint-based.

student newspaper. Where the forum for student expression is a newspaper, official censorship should be subject to particularly close scrutiny. Even more than a school library, the unique characteristics of a student newspaper make it an especially appropriate vehicle for the recognition of students' free speech rights. Cf. Board of Education v. Pico, 457 U.S. 853, 868 (1982). Whether or not a newspaper is produced completely apart or in conjunction with a curricular activity, it serves a function far broader than a typical classroom exercise.^{4/}

A newspaper's fundamental purpose is communication of information, ideas, and

^{4/} The First Amendment status of student newspapers has been consistently recognized by the lower courts. See e.g., San Diego Committee v. Governing Board, 790 F.2d 1471 (9th Cir. 1986); Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd, 564 F.2d 157 (4th Cir. 1977); Quaterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).

opinions on contemporary issues. A high school newspaper is a particularly unique forum in which constitutional principles have concrete, rather than abstract, meaning for students. High school journalism students receive more than classroom instruction on the values of a free press. They actually experience those principles when participating in publishing a newspaper.^{5/}

This Court has appropriately acknowledged that public school boards and their agents have wide discretion in managing the

^{5/} Spectrum's avowed policy, published at the beginning of each school year, stated:

Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: "Congress shall make no law restricting * * * or abridging the freedom of speech or the press * * * ."

That this right extends to high school students was clarified in the Tinker vs. Des Moines Community School District case in 1969.

Kuhlmeier v. Hazelwood School District, 795 F.2d 1368, 1372 n.3 (8th Cir. 1986).

affairs of their schools. All of their duties, however, must be performed "within the limits of the Bill of Rights." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943); see also Pico, 457 U.S. at 864 (plurality opinion) ("discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.") Although "extreme examples are seldom ones that arise in the real world of constitutional rights," Pico, 457 U.S. at 908 (Rehnquist, J., dissenting), this is one of those rare cases. When actions of school officials run roughshod over students' First Amendment rights, the federal courts must, and will, step in to ensure that the Constitution is not violated.

B. The Censorship of These Six Articles Undermined the Central Goals of the First Amendment

First Amendment limitations on government censorship protect the core political and constitutional values of our democracy.^{6/} Our system of free expression ensures free speech both as a value in itself, and as the means to promote access to information critical to individual decision-making on matters of personal and political concern. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 763-64 (1976).

The unilateral and arbitrary censorship in this case harmed the student writers and student readers in the very ways the First Amendment is intended to prevent. First, the

^{6/} J. Ely, Democracy and Distrust, A Theory of Judicial Review 105-116 (1980); L. Tribe, American Constitutional Law 737 (1978).

censorship could not help but undermine student beliefs in the democratic values that Hazelwood East seeks to inculcate. Second, First Amendment concerns are heightened because the content of the censored information is the kind of information critical to teenagers' daily decision-making in their personal lives^{7/} as well as important in preparing them for full participation in the political process.

As Justice Jackson recognized over forty years ago: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional

^{7/} This Court has recognized the First Amendment's role "in fostering individual self-expression but also . . . its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston v. Bellotti, 435 U.S. at 783. Justice White, in dissent, agreed that the First Amendment encompasses an individual's right to self-expression as well as a "right to hear or receive information," and "to interchange ideas." Id. at 806. Ideas which are related to individual choice are entitled to the highest First Amendment protections. See id. at 807.

freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Barnette, 319 U.S. at 637, quoted in Pico, 457 U.S. at 864-65; see also Ambach v. Norwick, 441 U.S. 68, 75-78 (1979). The transmission of democratic values simply cannot occur in an environment in which constitutional values are suppressed and in which authority is viewed as arbitrary and unfettered.^{8/}

^{8/} See also T.L.O., 469 U.S. at 386 (Stevens, J., concurring in part and dissenting in part) (Court's decision permitting searches of students without a warrant or probable cause "is a curious moral for the Nation's youth"); Pico, 457 U.S. at 880 (Blackmun, J., concurring) (suppression of information "hardly teaches children to respect the diversity of ideas that is fundamental to the American system"); Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 Yale L.J. 1647, 1654 (1986). Social science research supports the claim that democratic values are taught to students by direct example as well as formal instruction, particularly where the student's actual observations and experiences are inconsistent with formal instruction. See id. at 1654 n.31 (collecting [footnote cont'd])

The arbitrary actions of the principal here were antithetical to the communication of democratic, constitutional values. Not only were six unobjectionable articles censored, but there was no attempt to consult or communicate with the students prior to or, indeed, after the censorship decision. When the students received the issue of Spectrum and discovered that two full pages had been censored, they also received a clear message about the importance of their classroom lessons on democratic participation, the First Amendment, and a free press. These lofty and essential principles appeared empty in the face of the unbridled official censorship of their newspaper.

A second type of harm to Hazelwood East's students resulted from eliminating access to accurate information of great significance to teenagers, particularly those

Social Science research).

in trouble. Students from broken homes, or those who contemplated running away from home, suicide, premarital sex with or without contraception, or marriage, would have been helped by the faculty advice and factual information contained in the censored articles.^{9/}

The harm from this censorship falls disproportionately on teenage girls. Its impact is potentially irreparable for the simple

^{9/} Justice Powell proclaimed for the majority in Bellotti v. Baird, 443 U.S. 622, 642 (1979), that teenage pregnancy and childbearing present one of the "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." This Court has recognized that these "significant social, medical, and economic consequences" are imposed almost exclusively on teenage girls. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 470 (1981). Other studies verify that ignorance concerning sex, contraception and pregnancy, and the teen parenting which results from such ignorance, impact disproportionately on teenage girls. See, e.g., id. at 470 n.4; Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away, at 30 (1981) ("Teenage Pregnancy"). Because it eliminated accurate, and potentially the sole source of information for many teens, the censorship in this case had a particularly deleterious and sex specific impact.

reason that information about contraceptive laws, the dangers of pregnancy, teen motherhood and teen marriage is not readily available elsewhere, either within the school or without.^{10/}

A great deal of the most important censored information was contained in the four articles to which the principal expressed no objection. Ironically, this information countered any relatively positive views on pregnancy contained in the profile stories, which the principal censored in part because he wanted "to avoid any appearance that the school endorsed the sexual norms of the stu-

^{10/} Even a sex education course may not provide students with information comparable to that censored from the school paper. The course content of sex education classes is often so woefully uninformative that students do "not learn even basic facts such as the time of the month when pregnancy is most likely to occur." Teenage Pregnancy, supra, at 37.

dents profiled. . . ."^{11/} Petitioners' Brief, at 34. These four articles not only dispel any claim that the school endorsed the behavior of the profiled students, but also provided students with accurate information about the detrimental impacts of early pregnancies on teenage girls.^{12/}

^{11/} As reported in the first "unobjectionable" article, teenage pregnancy is a fact of life. Apparently, the principal was able to acknowledge teen pregnancy in Missouri but not in Hazelwood High School. His censorship was viewpoint-based to the extent the censor believed reporting on pregnancy and in one case, a married teenage mother, would legitimate teenage sex. Similar censorship could be imposed against reporting on AIDS, teen suicide, and other major problems that affect teenagers. Because teenagers read, listen to and are influenced by their peers, it is essential, both from a First Amendment and a public health standpoint, that speech by teenagers be encouraged not discouraged. Surgeon-General Dr. Everett Koop recently emphasized this point: "many people -- especially our youth -- are not receiving information that is vital to their future health and well-being because of our reticence in dealing with subjects of sex, sexual practices, and homosexuality. This silence must end." "AIDS Report Calls for Sex Education," The Washington Post A13, October 23, 1986; see also 1 Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 146 (C. Hayes ed. 1987).

^{12/} Mr. Kerchkoff, a Hazelwood East teacher, was pro-[footnote cont'd]

The principal's approach to these articles demonstrates the truth of the constitutional adage that the solution to speech "is more speech, not enforced silence."

Whitney v. California, 274 U.S. 357, 377

minently featured in the censored article "Teenage marriages face 75 percent divorce rate." He focused on the high rate of failure of teenage marriages, which are partly due to early pregnancies, and he stressed the disadvantages of both. The lead article provided valuable information on teenage pregnancy that helped counter-balance the profile story. The article unequivocally treated teenage pregnancy as a problem, not a benefit:

Teenage pregnancy is becoming an epidemic. It has become a major health, social, and economic problem for this country.

It also described the "consequences" of teenage pregnancy as "alarming" and stated, "the rate of teenage sexual activity in the U.S. is alarmingly high."

The suppression of the "Squeal law" article denied students knowledge that a federal judge had permanently enjoined the "squeal law" from going into effect. Planned Parenthood Federation of America, Inc. v. Schweiker, 559 F. Supp. 658 (D.D.C.), aff'd, 712 F.2d 650 (D.C. Cir. 1983). As the article noted, this rule would likely have led to an increase of up to 100,000 unwanted pregnancies. At the time the rule was proposed, a great deal of confusion resulted among teenage girls. Affidavit of Melita Gesche, M.D. at A160-A162 in Joint Appendix, State of New York v. Schweiker, 719 F.2d 1191 (2d Cir. 1983). Many stayed away from birth control clinics in fear that the rule was already in effect. Planned Parenthood Federation, 559 F. Supp. at 666 n.13 (and article cited therein).

(1926) (Brandeis, J. dissenting). This Court has long recognized that the First Amendment is best served when government power to limit speech is rejected in favor of promoting more, rather than less, information on a topic. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981). People, including minors, can make responsible, intelligent decisions about competing choices only when they have information.^{13/}

^{13/} Overwhelming recent data demonstrates the capability of teenagers' decision-making processes. See, e.g., Report on the Interdivisional Committee on Adolescent Abortion of the American Psychological Association, Adolescent Abortion: Psychological and Legal Issues, 42 Am. Psychologist 73 (Jan. 1987); Melton, Developmental Psychology and the Law: The State of the Art, 22 J. Fam. L. 445, 463-66 (1984) (and citations therein).

This Court has also recognized the ability and right of mature teenagers to make abortion and contraceptive decisions without state or parental input. See, e.g., Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976); Bellotti v. Baird, 443 U.S. 622, 642 (1979). See also Carey v. Population Services Int'l., 431 U.S. 678 (1977). The State of Missouri also enables minors' to consent for treatment for venereal disease, prenatal care, and treatment for their infants. Mo. Ann. Stat. §§ 431.061; 431.065 (Vernon Supp. 1986).

While government may not be required to provide information upon which minors or adults rely for their decision-making, the First Amendment limits its power to prevent others from providing it.

The benefits of a system of free expression inure not only to the individual, but to the public.^{14/} While the individual students

^{14/} As explained in the first article, and as repeatedly and eloquently recognized by this Court, see infra, n. 15, teen childbearing often destroys a teenager's educational opportunities and thus her ability to assume a full role as a responsible citizen in a democracy. Mothers who give birth before age 18 are only half as likely to have graduated from high school as those who postpone childbearing until after age 20. Women who delay childbearing until their twenties are four to five times more likely to finish college than those who become mothers in their teens. Card and Wise, Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing and Educational Attainment, 9 Fam. Plan. Persp. 199 (1978); see also Moore and Waite, Early Childbearing and Completion of High School, 17 Fam. Plan. Persp. 234 (1985). Likewise, the children of teenage parents suffer educational disadvantages: lower I.Q. and achievement scores and more likely to repeat at least one grade. Baldwin and Cain, The Children of Teenage Parents, 12 Fam. Plan. Persp. 37 (1980). Teenage mothers are also seven times more likely than others to be poor. Teenage Pregnancy, supra, at 33.

-- the authors and readers -- suffered direct harm from the censorship, the public too pays a penalty for government restrictions on information and actions that stifle the development of young people who are the voting citizens of tomorrow.^{15/}

II. THE CENSORSHIP OF THESE SIX ARTICLES WAS CONSTITUTIONALLY IMPERMISSIBLE

A. This Censorship Was Not A "Curricular" Decision

Amici acknowledged that the school administration retains broad control over its curriculum and can determine to a considerable extent its content. See, e.g., Pico, 457 U.S. at 864 (plurality opinion); Tinker, 393 U.S. at 507. The principle of curricular

^{15/} See also First National Bank of Boston, 435 U.S. at 783; see also Saxbe v. Washington Post Co., 417 U.S. 843, 864 (1974) ("The underlying right is the right of the public generally" to information needed in the political process) (Powell, Jr., dissenting); Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) ("The very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind.").

control, however, is not a license for the unbridled censorship of student newspapers.^{16/} Moreover, the principal's censorship of these six articles was not an educational decision related to any pedagogical purpose of the Journalism curriculum.

This Court has never recognized that curricular decisions are immune from First Amendment limits. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) (law prohibiting teaching of Darwinian theory of evolution held unconstitutional); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas'"; "the First Amendment . . . "does not tolerate laws that cast a pall of orthodoxy over the classroom."); Meyer v. Nebraska, 262

U.S. 390 (1923) (state law prohibiting teaching of modern foreign languages held unconstitutional); see also Pico, 457 U.S. at 861 (plurality opinion) (recognizing "certain constitutional limits upon the power of the state to control even the curriculum and the classroom").

More important, petitioners' concept of "curriculum" is unacceptably overbroad. Spectrum is plainly not part of the curriculum in the same sense as an English or Math class. As the court below properly recognized, producing and publishing Spectrum was "something more" than merely part of the curriculum. 795 F.2d at 1373. "It was a 'student publication' in every sense." Id. at 1372. As Spectrum's advisor testified:

It's a student paper, so that the students, first of all, decided the stories, and, you know, wrote the stories, so they obviously were deciding the content. They were writing them. I would help if there were any matters that they

^{16/} Under petitioners' view, students could be compelled to recite the Pledge of Allegiance simply by making a compulsory flag salute an integral part of a civics class. Yet, we know that this the school may not do. See Barnette, supra.

had questions of, legalwise or ethicalwise, but -- .

Id. (emphasis added).

Obviously, Spectrum had a dual function; it was both intended as a forum for student expression and as an educational tool for journalism students. In determining the constitutional role of state actors in regulating student speech it is essential to distinguish between these functions.

A classroom journalism teacher inevitably is involved in a myriad of day-to-day "editorial" decisions involving the precise content of student-written articles. The teacher's authority to ensure that the articles meet journalistic standards of grammar, style, and competence, however, has never been an issue in this case.

Spectrum was approved for publication by its faculty advisor. Then, and only then, did the principal intervene. He intervened, moreover, in the role of government censor or

regulator, as surely as did the school officials in Tinker. His decisions were unrelated to any pedagogical function of Spectrum or the Journalism II class. Objecting to parts of two articles, he deleted all six because that was the administratively convenient solution. He never consulted with the advisor or considered alternatives. The students discovered the censorship only after publication. Indeed, the only "educational" message conveyed by the principal's actions was the arbitrariness of authority and the dissonance between the rhetoric and reality of individual rights.

Of course, school administrators are not inherently removed from the educational process. But the censorship decision here was no more educational than the decision in Pico to remove school library books because they were "anti-American."

B. The Standard of Review

Every student speech case involves two subsidiary questions: whether the speech is protected and whether it is exercised in an appropriate place. The Eighth Circuit regarded these questions as analytically distinct and analyzed the latter inquiry under the public forum doctrine. Amici believe that the standard articulated by this Court in Tinker provides a suitable framework for analyzing both questions. Under either analysis, however, school officials who act as government censors must, at the very least, provide a substantial justification for their actions. On this record, that burden has not been satisfied.

1. The Tinker Standard

Under this Court's decision in Tinker, students retain free speech rights, except to the extent that such expression "would substantially interfere with the work of the

school or infringe upon the rights of other students." Tinker, 393 U.S. at 509. This standard incorporates the notion that speech must be exercised in an appropriate setting within the school.^{17/}

Obviously, not all aspects of the school are equally open to student expression. See Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972). For example, Tinker's "substantial interference" standard prevents students from commandeering classrooms to discuss issues the teacher decides is inappro-

^{17/} Unlike a typical public forum case, this case does not involve a party who is seeking to speak in a government facility to which he has been denied access. Here, there is no question that the Journalism II students can "speak" in the "forum" of Spectrum. The only question is, having created that access, to what extent can the government control the content of that speech. Public forum analysis may be more appropriate in the school setting when a particular group is denied access to school property or facilities that are open to other groups. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981); San Diego Committee, supra, 790 F.2d 1471; Student Coalition for Peace v. Lower Merion School District, 776 F.2d 431 (3d Cir. 1985).

priate. No one disputes that in a silent study hall, all speech can be "suppressed." On the other extreme, lunch period is generally open to students to talk freely about a wide variety of subjects.

Spectrum undoubtedly represents a medium for student speech within the school community. As such, it is no more subject to censorship than the armbands in Tinker, absent credible evidence of material disruption or invasion of the rights of others. At best this record presents the sort of "undifferentiated fear" that Tinker rejected. 393 U.S. at 508. Accordingly, amici believe that petitioners' claims can be rejected on the basis of Tinker alone.

In the following section, we nonetheless analyze this case in public forum terms because it is the approach followed by the

court below as well as other lower federal courts.^{18/}

2. The Public Forum Doctrine

As discussed in Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37 (1983), there are two kinds of public forums -- "traditional" public forums such as streets and parks, and government-created or "designated" public forums. Id. at 45-46. Within a designated public forum, any content-based exclusions must "serve a compelling state interest . . . that . . . is narrowly drawn to achieve that end." Id. at 45.

In this case, Hazelwood East created a designated public forum by opening up Spectrum for use by journalism students as a place for discussion of topics of general

^{18/} See, e.g., San Diego Committee, 790 F.2d at 1474-76; Bender v. Williamsport School District, 741 F.2d 538, 544-46 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534 (1986); Gambino, supra, 564 F.2d at 158.

interest to its high school audience.^{19/}
See, e.g., Perry Education Assoc., 460 U.S.
at 45 n.7. ("A public forum may be created
for a limited purpose such as use by certain
groups, e.g., Widmar v. Vincent (student
groups), or for the discussion of certain
subjects, e.g., City of Madison Joint School
District v. Wisconsin Public Employment Rela-
tions Comm'n (school board business)."). The
school has no "competing" extracurricular
newspaper. Spectrum "occupies" the field and
students had every right to believe, until
this incident, that they could express them-

^{19/} Spectrum was in part funded with public monies.
Nothing in the Constitution compels Hazelwood East to
finance a student newspaper. In recognizing that
Hazelwood East created a limited public forum in
Spectrum, the courts do not force the school board to
do something it has not itself already done, nor does
it require that the school board finance Spectrum
indefinitely. See Perry Educ. Ass'n, 460 U.S. at
46. Whether public forum analysis would apply to
student newspapers produced outside the school
environment but distributed by students on school
property, or to either curricular or extracurricular
school-produced, but independently financed student
newspapers is not at issue here.

selves freely on a wide range of subjects.

To determine whether the state has in-
tended to create a "designated" public forum,
courts must look "to the policy and practice
of the government" and to "the nature of the
property and its compatibility with expres-
sive activity" Cornelius v. NAACP
Legal Defense and Educational Fund, Inc., 87
L.Ed.2d, 567, 580 (1985). Here it is diffi-
cult to imagine "property" that is more com-
patible with expressive activity than a news-
paper.^{20/}

^{20/} Unlike several cases in which the Court held that
a public forum had not been created, expressive
activity is not an incidental function of Spectrum,
even if it is not its sole purpose. See, e.g.,
Cornelius, 87 L.Ed.2d at 582 ("Government did not
create the [Combined Federal Campaign] for purposes of
providing a forum for expressive activity," but
rather, "to minimize the disruption to the workplace
. . . by lessening the amount of expressive activity
occurring on federal property.") (emphasis original);
Lehman v. City of Shaker Heights, 418 U.S. 298, 303
(1974) (purpose of the forum -- city buses -- is to
provide mass transit; advertising spaces were "inci-
dental to the provision of public transportation.");
Greer v. Spock, 424 U.S. 828 (1976) (purpose of mili-
tary base is wholly apart from, and generally incom-
[footnote cont'd]

The school's policy and practice toward Spectrum further reinforces the fact that it is intended to be open as a forum for student expression on a broad range of topics of interest to teenagers. Each year, Spectrum asserted its editorial independence from the school officials and asserted its rights to publish under the protection of the First Amendment. At no point did school officials ever object to these assertions. Nor did the administration ever prevent Spectrum from speaking on numerous controversial topics.^{21/}

patible with, a full range of expressive activities); Adderley v. Florida, 385 U.S. 39 (1966) (same for jailhouse grounds).

^{21/} Petitioners attempt to make much of the fact that several months before the censorship at issue occurred, the principal orally requested that he receive a copy of the galleys of each issue prior to publication. Nothing in the record indicates, however, that the principal intended to exercise unilateral pre-publication control of the content of Spectrum. Indeed, until the censorship here, the principal took no action with regard to the several issues of Spectrum he previewed. Certainly, nothing in this Court's precedents indicate that the government closes a public forum by designation merely by requesting that it preview the speech prior to its [footnote cont'd]

Where a forum has been created for expressive activities, and where there is no evidence of a longstanding policy and practice directly limiting access to the forum, the Court has not hesitated to find a limited public forum. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981); Madison Joint School District v. Wisconsin Public Employment Relations Commission, 429 U.S. 167 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

This longstanding policy and practice contrasts sharply with those cases in which the Court has found that government instrumentalities are not public forums, despite their use for and compatibility with communicative functions. In all these cases, the government acted affirmatively and consistently to limit access to its property in ways that clearly demonstrated lack of intent

distribution on government property.

to create a public forum. See, e.g., Cornelius, 87 L.Ed.2d at 581 (Government consistently limits participation in CFC to "appropriate" voluntary agencies and requires agencies to obtain permission from Campaign officials); Perry Education Assoc., 460 U.S. at 47 (practice of requiring permission from the individual school principal before gaining access to mail system); United States Postal Service v. Greenburgh, 453 U.S. 114, 129 (1981) (unlawful for almost fifty years to use mailboxes independent of the U.S. postal system); Lehman, 418 U.S. at 300-01 (for 26 years City refused access for political advertising on its buses). Here, by contrast, there is no evidence that school administrators had previously interfered with the publication of any of Spectrum's contents.

C. **Petitioners Fail To Provide A Constitutionally Adequate Justification For This Censorship**

1. **There is No Justification For The Censorship of the Four "Unobjectionable" Articles**

Under any relevant standard developed by this Court, the suppression of the four "unobjectionable" articles cannot stand. At the very least, content-based regulation of otherwise protected speech must be "reasonable." See Perry Education Association, 460 U.S. at 46. That standard cannot be met by a principal's decision to censor four articles of obvious importance to the school community for no reason other than their appearance on the same pages with two other, disputed articles. Nor is it reasonable for a principal to rely on a publication deadline without even bothering to inquire whether the deadline was flexible or could be met without the wholesale deletions ordered here. "The separation of legitimate from illegitimate

speech calls for ... sensitive tools"

Speiser v. Randall, 357 U.S. 513, 525

(1958). "Precision of regulation must be the touchstone" when First Amendment values are at stake. NAACP v. Button, 371 U.S. 415, 438 (1963). Amici know of no case that can even be stretched to sustain the censorship of four newspaper articles that everyone agrees are fully protected by the First Amendment. At a minimum, therefore, this aspect of the principal's decision must be reversed.^{22/}

^{22/} Petitioners' cite to Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), for the appropriate standard of deference that should be accorded to school officials' suppression of student speech. Fortunately, this Court has explicitly rejected such an analogy: "[I]t goes almost without saying that '[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.'" New Jersey v. T.L.O., 469 U.S. at 338 (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977)).

2. The Censored Articles Did Not Invade The "Rights" of Students

Petitioners attempt to justify this sweeping censorship by alleging that material in the profile article possibly resulted in an invasion of the rights of others." Tinker, 393 U.S. at 513; Petitioners' Brief, at 43.^{23/} This allegation is neither factually correct nor, standing alone, sufficient to justify the censorship that took place. As the Court in Tinker repeatedly emphasized, "undifferentiated fear or apprehension" is not enough to overcome the right to freedom of expression even in the school setting. Tinker, 393 U.S. at 508; see also Pico, 457 U.S. at 866 (plurality opinion). Tinker clearly requires that schools demonstrate substantial and material

^{23/} Petitioners do not claim, and there is no evidence, that the news articles in any way "materially disrupt[ed] class work or involve[d] substantial disorder." Tinker, 393 U.S. at 513.

harm. 393 U.S. at 509.

Despite petitioners' urging, this case does not require the Court to define precisely Tinker's use of the phrase "invasion of the rights of others." Simply put, these articles did not "invade" any "rights", however defined, of any persons.^{24/}

In support of their position, petitioners assert that the profile of pregnant students potentially threatened their privacy.

^{24/} Amici agree with the Eighth Circuit that the use of the term "rights" in Tinker was not fortuitous, and that "invasions of rights" should be limited to legally cognizable rights. The word "rights" in our society is consistently and pervasively understood as relating to legal standards, particularly when used by courts. A legal definition provides standards to guide conduct that is otherwise wholly lacking from the word "rights." Especially in the First Amendment free speech area, intelligible standards are essential to prevent arbitrary and overbroad government suppression of speech. See Kolender v. Lawson, 461 U.S. 352, 358 (1983). Had the Court intended to allow suppression of a broader category of speech it could have used phrases such as "causing harm to others" or "substantially offending others." The very attempt to define "rights" without reference to legal standards demonstrates the difficulty, even futility, of the effort. The school board, for example, does not offer an alternative definition.

On this record, however, that claim has no basis. Each of the students voluntarily consented to the interview. Each was told that the interview was for purposes of a newspaper article. And each of the students was assured that their names would not be used, as in fact they were not.^{25/} All of the information in the article was taken from the students' own written responses to written inquiries. They were undoubtedly as aware as anyone whether and to what extent the information they provided could identify them.

^{25/} The school board attempts to make an issue of the absence of parental consent to these interviews. Petitioners' Brief, at 7. The notion that students cannot speak about their reproductive choices without parental consent, although they can make reproductive choices without parental consent, see, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976), is frivolous. Indeed, one of these students was married and no longer in school; another was already a mother. Under Missouri law, these teenagers were capable of making a variety of important choices concerning medical treatment and privacy choices for both themselves and their babies. See e.g., Mo. Stat. Ann. §§ 431.061; 431.065 (Vernon Supp. 1986).

Mere unsupported speculation that these high school students may later regret these profiles hardly qualifies as the invasion of rights to which Tinker referred. Whether or not school administrators or fellow students could identify these students, the article in no way "invaded" any rights that they retained after consenting to the profiles. Indeed, if the school board was truly motivated by a concern for invasions of privacy rights of the students, it would have acted as strenuously to suppress those copies that were xeroxed and distributed, or at least to punish the "wrongdoers", since the identical articles surely "invaded" the students' rights to the same degree as if they had been published in Spectrum.^{26/}

^{26/} Petitioners appear to abandon any claim that these articles invaded the "rights" of the profiled students' parents, husband, or boyfriends. In any case, it is extremely difficult to see what "rights" they had that were invaded. Furthermore, the Eighth Circuit's legal liability standard is particularly [footnote cont'd]

3. No Other Interests That Petitioners Assert Justify This Censorship

None of the other reasons put forth by petitioners, all unrelated to the harms identified in Tinker, can justify the censorship that occurred here. ^{27/} First, the school board asserts that the entire divorce article was properly suppressed because a student's name was used and because the principal believed a quotation in the article raised a

appropriate in this context, especially where the persons affected are adults. Tinker clearly focused on the impact of student speech in the school setting, not on the outside community. 393 U.S. at 509; see also Fraser, 92 L.Ed.2d at 557. The school lacks an interest in protecting adults outside the school and adults do not need the degree of solicitude or protection that may justify more broad concerns for adolescents' well-being. Requiring an invasion of a nonstudent's legal rights prior to censoring student speech serves fully the school's interests -- protecting itself and its students from liability.

^{27/} Petitioners do not attempt to justify any of these reasons as compelling, and in light of the content of the articles, no such justifications would be tenable. The Court need not inquire into the compelling nature of the state's interests, however, because the regulations were not "narrowly drawn." Perry, 460 U.S. at 46.

question of "fairness." In fact, the student's name had already been deleted, as the principal would have learned had he bothered to inquire. Nor did the principal inquire into the possibility of modifying or deleting the "objectionable" language. Choosing to censor all six articles is plainly not a reasonable method to impart a "lesson" about journalistic "fairness."

Second, the claim that the divorce and profile articles were inappropriate for a high school audience is unsupportable. These are two problems that are ubiquitous among the nation's teenagers -- and Hazelwood East, as the articles show, is no exception. The notion that student speech on these topics is both inappropriate and subject to censorship demonstrates the necessity for judicial scrutiny in this case.^{28/}

^{28/} Fraser does not support the school board's claim that courts must defer to school officials' assertion [footnote cont'd]

The third claim, that the school did not want to appear to endorse the students' sexual norms, is an equally unsupportable basis for this censorship. As noted above, faculty members who were featured in four of the censored articles emphasized the problems of teenage pregnancy and marriage. No fair reading of the articles as a whole could be construed as official endorsement of these students' sexual norms.^{29/} Furthermore, Spectrum's explicit policy of editorial independence was stated at the beginning of the

that any speech is inappropriate. In Fraser, the Court merely held that courts would not second-guess school officials' determinations that lewd and vulgar speech is inappropriate in particular school settings. 92 L.Ed.2d at 558. In petitioners' view, courts could not review suppression of Tinker's armband if school officials call it "inappropriate."

^{29/} This "endorsement" argument also carries a grave threat of viewpoint discrimination. One may wonder if the school would have made the same claim if the students had stated they had made a mistake in having sex prior to graduating high school and getting married. Again, could the school board ban Tinker's armband because the school did not want to give the "appearance of endorsing" the students' opposition to the war in Vietnam?

school year and was presumably well-known among its readership.

Whatever the objection to these articles, the principal's response fell far short of a "narrowly drawn" or even "reasonable" one. He had numerous options short of deleting four other articles. The principal did not suggest any revisions, additions, or deletions that would have made them more acceptable. He did not consult with the advisor or the student journalists. He did not inquire into delaying publication to enable the pregnant students to be informed of that article's contents. Nor did he consider requesting the inclusion of a caveat stating that the administration did not endorse the views expressed therein.

D. This Ad Hoc and Standardless Censorship Procedure Violated First Amendment Due Process Principles

This censorship largely resulted from ad hoc, standardless decision-making. To avoid

such overbroad censorship and to insure "breathing space" for First Amendment rights, this Court has long required that the state act pursuant to established standards and procedures when regulating expressive activities. See NAACP v. Button, 371 U.S. at 438; see also Pico, 457 U.S. at 874 (plurality opinion). Not only did the school board have an extremely vague policy for student publications, see Kuhlmeier, 795 F.2d at 1377 nn. 6-7, (quoting Hazelwood School Board Policy Nos. 348.51),^{30/} no procedures existed to implement that policy, other than the princi-

^{30/} The only arguably relevant regulation is the hopelessly vague phrase "within the rules of responsible journalism" contained in School Board Policy No. 348.51. Certainly there is no contention that the articles were "commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the education process." See Policy No. 348.51, quoted in 795 F.2d at 1377 n.7. Although a school disciplinary code need not be as detailed as a criminal code, see Fraser, 92 L.Ed.2d at 560, only the vaguest of standards and no procedures existed here for pre-publication review and censorship.

pal's oral request that he receive a copy of the galley to Spectrum prior to publication.

The lack of articulable standards or procedures conferred unbridled discretion on the principal and led to this arbitrary and overbroad censorship. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969). Among the most efficient of the "tools" for the "separation of legitimate from illegitimate speech," Speiser v. Randall, 357 U.S. at 525, is the requirement that censorship decisions be preceded by a rational, deliberative process. As the plurality noted in Pico, "the presence of such sensitive tools in petitioners' decision-making process would naturally indicate a concern on their part for the First Amendment rights of respondents; the absence of such tools might suggest a lack of such concern." 457 U.S. at 874 n.26.

Unfortunately, no such sensitive tools

were employed here. Comportment with de minimis procedures prior to this censorship would have achieved the salutary purposes that the First Amendment due process mechanisms serve. Even the most rudimentary procedures, such as an inquiry into publication deadlines and a discussion of alternatives, would have revealed that no immediate decision on the articles was necessary and therefore any action could in fact have been narrowly tailored to precise objections. This case highlights the reality that when public officials act in the First Amendment area without standards and procedures, rational decision-making is well-nigh impossible.

CONCLUSION

For the reasons stated herein, amici respectfully request that this Court affirm the judgment of the court below.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

CATHY KUHLMEIER, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF STUDENT PRESS LAW CENTER,
JOURNALISM EDUCATION ASSOCIATION,
COLUMBIA SCHOLASTIC PRESS ADVISERS ASSOCIATION,
QUILL AND SCROLL SOCIETY,
NATIONAL SCHOLASTIC PRESS ASSOCIATION/
ASSOCIATED COLLEGIATE PRESS,
MISSOURI JOURNALISM EDUCATION ASSOCIATION,
JOURNALISM ASSOCIATION OF OHIO SCHOOLS,
SOUTHERN INTERSCHOLASTIC PRESS ASSOCIATION,
GARDEN STATE SCHOLASTIC PRESS ASSOCIATION,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-836

HAZELWOOD SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

CATHY KUHLMEIER, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF STUDENT PRESS LAW CENTER,
JOURNALISM EDUCATION ASSOCIATION,
COLUMBIA SCHOLASTIC PRESS ADVISERS ASSOCIATION,
QUILL AND SCROLL SOCIETY,
NATIONAL SCHOLASTIC PRESS ASSOCIATION/
ASSOCIATED COLLEGIATE PRESS,
MISSOURI JOURNALISM EDUCATION ASSOCIATION,
JOURNALISM ASSOCIATION OF OHIO SCHOOLS,
SOUTHERN INTERSCHOLASTIC PRESS ASSOCIATION,
GARDEN STATE SCHOLASTIC PRESS ASSOCIATION,
COLLEGE MEDIA ADVISERS,
COMMUNITY COLLEGE JOURNALISM ASSOCIATION,
ASSOCIATION FOR EDUCATION IN JOURNALISM
AND MASS COMMUNICATION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The Student Press Law Center ("SPLC") is a national, non-profit, incorporated, legal research, information and advocacy organization formed for the purpose of promoting and preserv-

ing the First Amendment rights of high school and college journalists. Since its founding in 1974 by professional journalists and journalism educators, the SPLC has collected information on censorship of the student press from around the country, submitted numerous *amicus curiae* briefs and litigated two student press cases.

The Journalism Education Association ("JEA") is a national association of approximately 1,200 high school journalism teachers and student publications advisers. JEA reaffirms its position statement first adopted in 1974 upholding the free press rights of students and affirming the role of teachers and administrators as advisers and instructors of students in dealing with sensitive issues, not censors seeking to prevent the writing or publication of material that raises such issues.

The Columbia Scholastic Press Advisers Association ("CSPAA") is a national association of over 2,000 high school publications advisers and journalism teachers headquartered at Columbia University in New York City. CSPAA is a longstanding supporter of student press freedoms and its members believe that such freedoms are critical to the future of journalism education.

Quill and Scroll Society is the only international honorary society for high school journalists with chartered chapters in more than 12,850 high schools in all 50 states and abroad and annually admits more than 12,000 students for membership. Quill and Scroll Society encourages and rewards individual achievement in journalism and has taken an active part in raising the standards of scholastic journalism since 1926. The Society is strongly committed to support of student press rights and believes a free press must be inviolate if democracy is to survive.

The National Scholastic Press Association ("NSPA"), including its college division, the Associated Collegiate Press ("ACP"), is a non-profit, educational membership association founded in 1921. NSPA/ACP provides evaluation services, educational programs and learning materials for student publications throughout the country and believes in the First Amend-

ment rights of student journalists and the need for educational programs that teach those rights.

The Missouri Journalism Education Association ("MJE") is an association of approximately 145 high school journalism teachers and publication advisers from the state of Missouri, including five current advisers in the Hazelwood School District. MJE supports the free expression rights of student journalists and believes that such rights are an important part of journalism education.

The Journalism Association of Ohio Schools ("JAOS") is an association of high school journalism advisers that represents nearly 100 schools in the state of Ohio. JAOS has been a state and national leader in advocating free expression rights for students for more than 50 years.

The Southern Interscholastic Press Association ("SIPA") is a non-profit association of high school publications advisers and student journalists from 15 states in the southern United States that annually serves more than 240 high schools. Headquartered at the College of Journalism of the University of South Carolina, SIPA is concerned about the future of scholastic journalism and is strongly committed to student First Amendment rights.

The Garden State Scholastic Press Association ("GSSPA") is an association of publication advisers and journalism teachers from the state of New Jersey. GSSPA is in full support of First Amendment rights for those under the age of 18 and freedom of the student press as guaranteed by the Constitution of the United States.

College Media Advisers ("CMA") is a national organization of nearly 600 advisers of college student media. CMA has been a staunch supporter of the rights of students to a free press since its founding in 1954 and believes a curtailment of student press rights would do incalculable harm to the future of journalism education.

The Community College Journalism Association ("CCJA") is the only national professional organization exclusively for journalism educators and publications advisers at community and junior colleges and has more than 200 members. CCJA is an advocate for student press freedoms and is devoted to fighting against threats to those freedoms.

The Association for Education in Journalism and Mass Communication ("AEJMC") is a membership organization of approximately 2,000 educators in institutions of higher learning committed to raising the standards of teaching in journalism, developing closer relations with the mass communication community and professional associations, fostering research and defending and maintaining freedom of expression and communication. AEJMC recognizes the vital role played in the high schools in preparing consumers for intelligent media use as well as in laying the foundation, in interest and ability, for prospective students in its schools.

Amici's membership and constituency includes tens of thousands of high school journalism teachers and publications advisers who are involved daily with the issues that this case raises before the Court. As such, they are compelled to note that when petitioners presume to speak for high school journalism teachers and advisers, they speak inaccurately and without authority. *Amici* affirmatively reject the censorship control the Hazelwood School District requests and assure the Court that such censorship plays no role in the maintenance of order in our classrooms, but in fact makes impossible the teaching of journalism and is inimical to a quality educational environment. Moreover, all *amici*, as journalism educators, voice their alarm about the lessons that schools such as Hazelwood East High School, through their causal censorship, are teaching tomorrow's citizens about the importance of the First Amendment in our democracy.

Amici note that stories like those censored from *Spectrum* about teenage pregnancy and divorce are viewed by journalism

educators as the pinnacle of high school journalism. The 1987 American Newspaper Publishers Association/Quill and Scroll National Writing Contest award-winning story for in-depth reporting, which described a student's personal account of the rape of her sister, would never have been published if the reporter had been a student at Hazelwood East. Appendix A. *Amici* also note that over 75 percent of student publications at public high schools in this country are produced as part of a journalism class. These publications are in almost every instance the only outlet teenagers have for making their opinions, ideas and concerns known to their peers and the world. Were the Court to grant petitioners the relief they request, a great many voices would be lost. Teaching students journalism, including the legal and ethical responsibilities that accompany First Amendment rights, would be impossible. Dwindling interest among students in journalism study and the practice of journalism as a profession would soon follow. Disaffected young people with a growing indifference to the significance of constitutional guarantees would ultimately result.

Because of the impact this litigation will have on student journalism across the nation, *amici* have a strong interest in the outcome of this case.*

STATEMENT OF THE CASE

At the time of the events giving rise to this lawsuit, plaintiffs Cathy Kuhlmeier, Leslie Smart and Leanne Tippet were students in the Hazelwood East High School Journalism II class and were on the staff of *Spectrum*, the student newspaper at Hazelwood East. *Spectrum*, in the past and present, serves as a voice for the students at Hazelwood East, allowing them to raise in articles, editorials and letters to the editor issues that touch their lives inside and outside the school. Both written policies of

*The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

the school board and *Spectrum's* own pages noted that student expression would not be restricted in the student newspaper.

For the May 13, 1983, issue of *Spectrum*, staff members prepared a two-page spread of articles that focused on some of the problems teenagers face today. The articles focused on teenage pregnancy, teenage marriage, runaways and the effects of divorce on children, topics recognized as national crises for our nation's youth. Several students at Hazelwood East were interviewed or surveyed for these articles, making the issues covered more relevant and immediate to *Spectrum's* readers. All sources were informed in advance that their statements were being collected for use in *Spectrum*, and all gave their explicit consent to such use.

Pursuant to an unwritten policy at Hazelwood East, principal Robert Reynolds was given a copy of the galley proofs for the May 13 issue of *Spectrum* before they were returned with corrections to the printer. On May 11, 1983, without any notice to *Spectrum* staff members, Reynolds ordered adviser Howard Emerson to delete from the issue the two-page spread that contained the articles mentioned above. Reynolds later justified his decision by saying that the stories were "too sensitive" and "too mature" for the students at Hazelwood East. He said divorce, which affects the children of almost half of the marriages in the country,¹ was *per se* a subject "inappropriate" for a high school newspaper. Relying on Hazelwood school board policies, the Hazelwood School District superintendent and board of education approved the principal's censorship.

Plaintiffs brought this action asserting that their rights under the First Amendment to the United States Constitution had

¹ In recent months, psychologists have begun to publish research on the effects divorce and parental conflict have on children's grades, conduct and social competence in school. Rich, *Parental Fighting Hurts Even After Divorce; Effects of Conflict on Adolescents Studied*, The Washington Post, Nov. 12, 1986, at A8, col. 2. Over three years ago, student journalists at Hazelwood East sought to note and explain these same effects.

been violated and requesting declaratory relief and damages. The United States District Court for the Eastern District of Missouri, after trial without a jury, entered a judgment for the defendants. Plaintiffs appealed, and the United States Court of Appeals for the Eighth Circuit reversed the decision, finding *Spectrum* a public forum for student expression and holding that the school could not demonstrate that its censorship was necessary to avoid material and substantial interference with school work or discipline or an invasion of the rights of others. This Court granted appellees' petition for certiorari.

SUMMARY OF ARGUMENT

The Hazelwood School District created *Spectrum*, the student newspaper at Hazelwood East High School, as an outlet for the expression of students. Both through its explicit written policies and its practice of allowing students to determine the content of *Spectrum*, the school district demonstrated its intent to create an avenue for the expression of student viewpoints and news. As a result of this intent, as well as the nature of a student newspaper as an expressive activity, First Amendment protections for respondents must apply. Recognition of such protections in no way interferes with petitioners' ability to determine the curriculum of their journalism class.

Petitioners had the burden of proving their censorship justified. They could not do so. They were unable to demonstrate that their censorship of *Spectrum* was justified under the material and substantial disruption or invasion of the rights of others standard that this Court applies to censorship within a public high school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Petitioners censorship was a direct prior restraint of student expression. Such policies are presumptively invalid, and the school district presented no justification for its system. Rather the school district's prior restraint created a potential for its tort liability that would not otherwise have existed.

Petitioners policies under which they attempt to justify their censorship are unconstitutionally overbroad and vague and fail to provide necessary procedural due process.

ARGUMENT

I. RESPONDENTS, AS STAFF MEMBERS OF A SCHOOL-SPONSORED NEWSPAPER FOR THE EXPRESSION OF STUDENT VIEWS, ARE ENTITLED TO THE PROTECTIONS OF THE FIRST AMENDMENT.

As this court once so eloquently put it, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Petitioners nevertheless argue that public high school students who serve as reporters or editors for a school-sponsored student newspaper should be exempt from that precept.²

Every court since 1969 that has faced the question of student press rights, save the district court in this case, has found student journalism entitled to extensive First Amendment protection. More than the armbands at issue in *Tinker*, student newspapers are "pure speech."

The United States Court of Appeals for the Eighth Circuit, following other courts confronted with censorship of school-sponsored student newspapers,³ used the public forum doctrine

² *Amici* in support of petitioners cite a recent decision of this Court, which although initially seems applicable, is easily distinguished. Unlike *Bethel School District v. Fraser*, 106 S.Ct. 3159 (1986), the case at bar does not involve the subsequent punishment of "vulgar" or "indecent" oral speech or captive audience considerations.

³ See, e.g., *Stanton v. Brunswick School Department*, 577 F. Supp. 1560 (D.Me. 1984); *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977); *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969); *Punarella v. Birenbaum*, 37 A.D.2d 987, 327 N.Y.S.2d 755 (N.Y. App. Div. 1971), *aff'd*, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (N.Y. 1973). Other

as the basis of its analysis. Recognizing that the suppression of content by school authorities is in essence a denial of access to the pages of the student newspaper, these courts have relied on the analysis that has been applied to public auditoriums, *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and public university facilities, *Widmar v. Vincent*, 454 U.S. 263 (1981).

The public forum doctrine was developed to assure that once the state establishes a "forum" for public discourse or expression, it does not censor speech or speakers absent highly compelling circumstances. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, ___, 105 S. Ct. 3439, 3449 (1985). As such, the doctrine has a logical application to a school-sponsored student newspaper that is an avenue for the expression of student news and viewpoints.

In *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), this Court established three categories of forums under the public forum doctrine: 1) the quintessential public forum, 2) the limited public forum and 3) the nonpublic forum. *Id.* at 45-46. *Perry* and other rulings of this court indicate that a school-sponsored student newspaper such as *Spectrum* is a limited public forum.

A student newspaper is not a quintessential public forum as are streets and parks. *Amici* do not suggest that petitioners have opened *Spectrum* for unrestricted access by students and non-students alike. See *Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981). As the Court noted in *Perry*, a "public forum" may be created for a limited purpose such as use by certain groups. 460

cases have seemingly applied a forum analysis without specifically referring to it as such. See, e.g., *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Korn v. Elkins*, 317 F.Supp. 138 (D.Md. 1970); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (M.D. Ala. 1967), *dismissed as moot sub. nom. Troy State v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

U.S. 37, 46 n. 7 (1985). Rather, petitioners have established the student newspaper for use by the limited public of student staff members as a place for their expressive activity.

Nor do *amici* suggest that the public forum doctrine is the only valid method for defining and protecting student free press rights. Other courts have relied on a pure free press analysis similar to that enumerated by this Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1984); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986); *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 504 (2d Cir. 1975). *Amici* note that *Tinker* involved no finding of a public forum. Nevertheless, the Court found student expression protected by the First Amendment and school censorship impermissible. However, public forum analysis, which was relied on by the court of appeals in this case, is sufficient for affirmance.

A. The School District's Policy and Practice Established *Spectrum* as an Outlet for Student Expression.

No property is more compatible with expressive activity than a newspaper. The creation of a student newspaper inherently implies a free discussion of news and opinion. More importantly, the fact findings of the district court indicate that *Spectrum*, like other student publications, was "conceived, established and operated as a conduit for student expression on a wide variety of topics." *Gambino v. Fairfax County School Board*, 429 F. Supp. 731, 735 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977). See also, Student Press Law Cener, Law of the Student Press 14-15 (1985).

Petitioners own policies clearly establish that they intended *Spectrum* to be a forum for student expression. In Board Policy 348.5 they said, "Students are entitled to express in writing their personal opinions." *Kuhlmeier v. Hazelwood School District*,

607 F. Supp. 1450, 1455 (E.D. Mo. 1985). Board Policy 348.51 provided, "School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Id.* In stark contrast to *Perry Education Association v. Pery Local Educator's Association*, 460 U.S. 37 (1983), where the school district had a written contract explicitly stating the limitation on materials that could be distributed through its faculty mailboxes, the Hazelwood School District's policies encouraged unfettered student expression.

The practice at Hazelwood East also established *Spectrum* as an outlet for student expression. The fact that *Spectrum* was used as a supplement to the school's journalism curriculum does not negate the students' constitutionally protected activity. Although the faculty adviser oversaw many aspects of the newspaper's preparation and production, the fact findings of the district court and the testimony of the adviser at trial give no indication that he acted as anything other than adviser of *Spectrum*. Students were the actual editors of the newspaper. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1454 (E.D. Mo. 1985). *Spectrum* carried news items of interest to the Hazelwood East student body and the community. *Id.* at 1452. It covered many topics that could easily be described as controversial. *Id.* at 1453. *Spectrum* was clearly not just an exercise in student writing skills.

Not all stories produced by students in the journalism class were printed in *Spectrum*. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1452. Students not enrolled in the class could submit their material to the newspaper for possible inclusion. *Id.* at 1453. The grades of students in the journalism class were not affected by whether their stories were published. *Id.* at 1453. *Spectrum* was distributed to the school community and the public as a newspaper. *Id.* at 1452. Thus *Spectrum* clearly had an important function beyond that of the schools' journalism classes. It was not merely a course exercise that remained in the files of the journalism department.

The message of the school district's policies reaffirmed the experience of students who worked on the staff of the student newspaper at Hazelwood East: *Spectrum* was by intention and in fact a student newspaper for the presentation of student news, views and opinions.⁴

⁴The situation of *Spectrum* at Hazelwood East is comparable to other student publications that have been recognized as protected by the First Amendment. In *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969) the court rejected censorship of a student newspaper described by school officials as a curricular device "intended to inure primarily to the benefit of those who compile, edit and publish it." *Id.* at 103. Such a claim was without merit, the court said, noting that the newspaper was sold to the student body, included letters to the editor and ran stories on controversial topics. "[I]t is clear that the newspaper is more than a mere activity time and place sheet." *Id.* See also, *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (literary magazine produced with the advice of a college English department and connected to a course for credit found to be a public forum); *Gambino v. Fairfax County School Board*, 429 F.Supp. 731, 733 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977) (high school newspaper sold to the public on which some of the staff members were enrolled in a journalism class and received academic credit for work on the newspaper); *Stanton v. Brunswick School Department*, 577 F.Supp. 1560 (D. Me. 1984) (high school yearbook that allowed students to include one short quote next to their photograph to be a *de facto* public forum). And in a factual situation difficult to distinguish from the one at Hazelwood East, the court in *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D. Ga. 1980), found the official high school student newspaper to be protected from censorship. There the student editors and staff were enrolled in a journalism class for which they received academic credit, and the teacher was newspaper adviser as well as instructor.

Thus numerous courts faced with factual situations nearly identical to that presented here have found the student publication to be a forum for student expression, not a vehicle existing at the sufferance of school administrators and under their total control.

B. Recognition of *Spectrum* as an Outlet for Student Expression Does Not Impair Petitioners' Power to Determine Curriculum.

Petitioners would have this Court believe that a failure to sanction their censorship denigrates the traditional control they have rightly been accorded over school curriculum. No such loss of curricular control will occur. Allowing high school students to include stories about teenage pregnancy and divorce in their student newspaper in no way interferes with what the school teaches in the classroom. The Hazelwood School District retains the right to decide what textbooks will be used in the journalism class. The classroom teacher can still choose his lessons and direct class discussion. The school has no obligation to make *Spectrum* a text or required reading for any student in any class. The exercise of student press rights creates no intrusion to the daily operation of the school. As classroom teachers of journalism, many of whom advise student publications, *amici* note that such press freedoms only enhance the educational process. In such an environment students learn that decisions about the publication of sensitive material are not to be made lightly. They learn that accountability both under the law and from their readers accompanies the exercise of freedom. A student that knows from experience a free press learns corresponding responsibilities.

II. PETITIONERS' CENSORSHIP OF *SPECTRUM* DID NOT SATISFY THE *TINKER* STANDARD.

Over 18 years ago, this Court set the standard for defining the state interest that would justify curtailment of student expression in a public high school. Only when the student expression in question "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" may the school interfere. *Tinker v. Des Moines Independent Community*

School District, 393 U.S. 503, 513 (1969).⁵ As the Court noted in *Tinker*, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. See, Student Press Law Center, *Law of the Student Press* 24-25 (1985).

Petitioners offer no evidence that the articles removed from *Spectrum* would have disrupted classes. Nor can they substantiate any reasonable forecast of an unwarranted invasion of privacy as a result of the stories in question.⁶ As the Court of Appeals noted, consent of all those interviewed was obtained by *Spectrum* staffers. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1376 (8th Cir. 1986). As the Restatement (Second) of Torts, section 892A (1982), notes, a minor's consent is effective if he is capable of appreciating the nature, extent and probable consequences of the conduct to which he consents, even if parental consent is not obtained or expressly refused. Although the petitioners presented witnesses at trial who claimed they could identify the students interviewed for the pregnan-

⁵ Once the state has created a limited public forum, its ability to impose constraints on expression in that forum is significantly restricted. "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 46 (1984) (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)).

⁶ As the court of appeals noted, to define *Tinker*'s "invasion of the rights of others" so that it allows censorship of material that is not materially and substantially disruptive or a tortious invasion of privacy is specious. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1376 (8th Cir. 1986). Such a standard would give a school unlimited control and would contradict what this Court contemplated when it coined the "invasion of the rights of others" language. *Tinker*, 392 U.S. 503, 740 (citing *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) (students who wore freedom buttons invaded the rights of other students by harassing them for not wearing buttons or forcing buttons on them)).

In addition, a school district that does not censor need not fear liability for the student newspaper's torts. See section III(D), *infra*.

cy story, they presented no evidence that any of those students lacked the ability to understand the effect of their consent. Significantly, none of the students have raised a complaint about the stories, which were subsequently published in their entirety in a regional newspaper. *Too hot for Hazelwood*, St. Louis Globe Democrat, Feb. 9, 1985 (Weekend Section), at 5. There would be serious First Amendment implications in giving the state the authority to effectively cut off a minor's access to the media that offer to carry her message.

Petitioners can no more paint their censorship of stories about teenage pregnancy and divorce as content neutral than could the school district in *Tinker*. The Des Moines school board had enacted a rule, seemingly neutral on its face, that banned the wearing of armbands in school, no matter what their color or message. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969). Although the restriction was clearly directed at suppressing controversy concerning Vietnam, this Court found no evidence that the school board approved of United States involvement in southeast Asia and thus wanted to prohibit students from voicing a contrary opinion. *Id.* at 510 n. 4. Nevertheless, it held a ban on engaging in controversial but non-disruptive expressive activity unconstitutional. Much as the school district in *Tinker* felt that "the schools are no place" for discussion of controversial issues, *Id.* at 509 n. 3, so the Hazelwood School District was motivated by discomfort over the discussion of teenage pregnancy and divorce. A blanket prohibition of such controversial topics threatens "a value at the very core of the First Amendment." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 (1980) (Stevens, J., concurring).

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic." *Id.*, 447 U.S. 530, 537 (1980) (majority opinion). Giving the state the power to set the agenda, and thus limit the issues for debate, can significantly encourage some views while suppressing other

See *Mission Trace Investments, Ltd. v. Small Business Administration*, 622 F. Supp. 687, 698 (D. Colo. 1985).

Moreover, petitioners' suggestion that their censoring actions involved no viewpoint suppression is disingenuous. Their own brief contradicts that assertion and demonstrates the crux of their decision to censor.⁷ In discussing the problem of teenage pregnancy and relating the issue to their readers, *Spectrum* staffers used the anonymous accounts of three pregnant teenagers at Hazelwood East. It was that fact, the "sexual norm" of those three students as petitioners refer to it, that provides the underlying basis of the school's decision to censor. See Petitioners brief at 34.

Undoubtedly, public school districts must maintain significant control over the education of students in their care. But "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education v. Pico*, 457 U.S. 853, 864 (1982).

III. THE HAZELWOOD SCHOOL DISTRICT'S CENSORSHIP AS A PRIOR RESTRAINT IS AN UNCONSTITUTIONAL INFRINGEMENT OF FIRST AMENDMENT RIGHTS.

A. Prior restraints are presumptively unconstitutional.

The freedom of expression clauses in the First Amendment were incorporated into the Constitution as a reaction to the censorship and licensing laws that had once dominated the English press. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 651-652 (1955). "[T]he main purpose of [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other

⁷ *Amicus Pacific Legal Foundation* has no hesitation in noting the viewpoints suppressed. Pacific Legal Foundation brief at 15.

governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Indeed, prior restraints on speech and publication have long been recognized as the "most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

To protect against this infringement on the right to free expression, this Court has repeatedly held that any system of prior restraint comes with a heavy presumption against its constitutional validity. *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). In those situations where the Court has indicated prior restraints might be allowed,⁸ the Court has mandated that a crucial safeguard must be observed: judicial superintendence. Almost immediately after initiating a prior restraint, the censor must initiate an adversarial judicial determination as to the validity of the restraint. *Freedom v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books*, 372 U.S. at 70.

The Court was explicit in setting forth its rationale for this requirement. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. at 58. The prior restraint of *Spectrum* and the policy on which it was based provided for no such safeguard.

⁸ The Court has often noted that those situations where prior restraints would be permitted are quite rare and in fact are limited to "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). *Accord Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). According to *Near*, only three types of cases would be listed as exceptional: threats to the nation's military security, "obscene publications," and speech inciting violence and the forceful overthrow "of orderly government." *Id.* See also *Nebraska Press Association*, 427 U.S. at 590-93 (Brennan, J., concurring).

B. A Practice of Prior Restraint of Student Publications Creates an Intolerable Interference With Protected Expression.

To permit the practice of prior restraint in public high schools would be to ignore a fundamental fact that school officials themselves frequently recognize: "school censorship is immune from review except in the unusual circumstance that a student is willing and able to challenge it in court." Letwin, *Administrative Censorship of the Independent Student Press — Demise of the Double Standard?*, 28 S.C.L. Rev. 565, 581 (1977). School officials can hardly be expected to be immune from the natural inclination to suppress criticism or unpopular views. If prior restraint is allowed, inevitably they will be tempted to censor "with less self-restraint than if judicial review were a routine and inescapable precondition to a ban on distribution." *Id.*⁹

⁹Even libelous material and unwarranted invasions of privacy (let alone substantially disruptive material) are not easily recognizable to laymen or the courts. Undoubtedly many a good-intentioned school official would reject much perfectly valid criticism and accurate reportage out of excess caution. Cf., *Farmers Education & Cooperative Union v. WDAY, Inc.*, 360 U.S. 225 (1959) (See section III(D) *infra*).

The fear of such temptation is not idle paranoia on the part of student journalists and advisers. Case after case has demonstrated that school officials routinely censor speech that is well within the bounds of First Amendment protection. See, e.g., *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977) (article censored that described existing methods of contraception); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (newspaper banned that described cheerleaders as "sex objects"); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (principal threatened students who distributed pamphlet criticizing school's prior restraint regulations); *Reineke v. Cobb County School District*, 484 F.Supp. 1252 (N.D. Ga. 1980) (newspaper confiscated that carried articles about the military draft and the energy crisis). Only the handful of students with the necessary financial resources, peer and parental support and sheer courage end up fighting unconstitutional censorship in court.

The Commission of Inquiry into High School Journalism convened by the Robert F. Kennedy Memorial established in 1974 that the problem of censorship is insidious and enduring. The Commission's public hearings, surveys and research caused it to conclude that "[e]ven [school] officials who are well aware of court decisions supporting a free high school press are prone to either ignore the court-approved standards or guidelines or apply them in such a way as to censor the paper." *Captive Voices, The Report of the Commission of Inquiry into High School Journalism* 42 (J. Nelson ed. 1974). The evidence overwhelmingly indicated that censorship by school officials focused on material dealing with controversial political issues, criticism of school employees or school policies and life styles and social problems such as birth control and drug abuse, all clearly protected speech. *Id.* at 41. Such findings as well as the growing number of requests for legal advice and assistance the Student Press Law Center receives each year, which reached 551 in 1986, do not bode well for a student that must live under a system of prior restraint.

Coerced self-censorship is the certain result of such unchecked authority. The chill of prior restraint, understandable in any situation, is only magnified by the relative powerlessness of high school students in relation to their administrators. Such self-censorship, with an accompanying cynicism about First Amendment guarantees, is the recognized result of years of unconstitutional school censorship. *Id.* at 48.

C. The Hazelwood School District Has Presented No Evidence To Support the Necessity Of Its Practice of Prior Restraint.

Presumably, a public school district that exercises prior restraint would suggest that such a practice is necessary for avoiding material disruptions and maintaining a level of quality education for its students. The Hazelwood School District apparently presumes such control is necessary without presenting

any evidence to indicate that such is the case. Can school officials be allowed to rely on the same "undifferentiated fear" that this Court has handily discounted? *Tinker*, 393 U.S. at 508.

The Court must weigh the likelihood of a "material and substantial disruption or invasion of the rights of others" resulting from the stories included in a student newspaper. It then must balance that weight against the potential for abuse in a system of prior restraint and our country's long antipathy toward such a practice. *Amici* are aware of only one case decided in the 18 years since *Tinker* where school officials were able to convince a court (incorrectly, *amici* believe) that a material and substantial disruption in fact would have occurred if censored material had been published in a school-sponsored student newspaper.¹⁰ In *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979), the court held that an editorial reference in the student newspaper to "hotheaded, egotistical, 'Pissed Off' jocks" could have resulted in a physical disruption based on the unsupported opinion of the building principal who was the censor, the coach of the athletes referred to and an English teacher. *Id.* at 1051. Furthermore, the court found that a reference to the unfitness and educational dishonesty of a student government vice-president met the *Tinker* standard although it refused to allow the censored students to prove the truth of the statements in a hearing. *Id.* at 1052.

Were the fear of disruption well founded, common sense would indicate that high schools which do not exercise prior restraint authority, including those in states under the jurisdiction of the Seventh Circuit Court of Appeals, would be in

¹⁰In *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978), the United States Court of Appeals for the Second Circuit held, over a persuasive dissent, that distribution of a student survey which solicited information regarding students' sexual practices met the *Tinker* standard for censorship. As such, the case did not involve material that a student newspaper was seeking to publish.

chaos. In *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), the Seventh Circuit held unconstitutional a school regulation providing for prior approval and restraint of student publications to be distributed on school grounds. Yet in the years since *Fujishima* there has been no suggestion that high school education in Illinois, Wisconsin and Indiana has suffered because of the limitation placed on school officials. The Seventh Circuit considered it sufficient that schools have the authority to subsequently punish students for activity that had created a material disruption. Moreover, it left the option open for school officials to seek injunctive relief when they anticipate that a situation warrants the extreme and immediate action of prior restraint. Yet no indication exists that even once in 15 years has a single school official in any of the three states taken advantage of this avenue.

In 1978, the Student Press Law Center developed a set of model guidelines for student publications that specifically prohibit prior review. See Appendix B. In the intervening nine years, school districts across the country, including Dade County, Florida, and Lakewood, Ohio, have used these guidelines as a starting point for adopting their own policy.¹¹

The logical conclusion from these facts, as well as those gleaned from high schools around the country, is simple: "Where a free, vigorous student press does exist, there is a healthy ferment of ideas and opinions, with no indication of disruption or negative side effects on the educational experience of the school." *Captive Voices*, *supra*, at 49. See also Student Press Law Center, *Law of the Student Press* 4, 56-57; Comment, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 De Paul L. Rev. 387, 419 (1979). Hazelwood School

¹¹*Amicus* School Board of Dade County, Florida, gives its own testimony of how a system rejecting prior review can produce outstanding student publications in successful schools. The statement of the Lakewood, Ohio, school superintendent is included in the Appendix C.

District presented no evidence to indicate that its practice of prior restraint is necessary. Thus it must be rejected.

D. A School District that Avoids Prior Restraint Is Protected from Liability For a Student Publication's Torts.

Amici National School Boards Association and National Association of Secondary School Principals assume that public high schools will be responsible for the torts of their student newspapers because of the agency relationship between the two and justify the need for control based on that fear. See, W. Prosser, *Law of Torts* § 69 (4th ed. 1971). Given the fact that there is not one reported decision where a court has held a public high school financially responsible for tortious material published in a student publication, their fear appears to have little basis. But more importantly, the determination of whether or not such an agency relationship exists is based on a three-pronged analysis: 1) consent, 2) benefit and 3) right of control. Restatement (Second) of Agency § 1 (1957). Because the First Amendment prohibits control by public school officials, those that follow its dictates cannot be held financially liable for the torts of their student newspapers.

The Court has recognized precisely this principal in a slightly different context. In *Farmers Educational & Co-operative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), it held that broadcasting stations licensed by the Federal Communications Commission are barred from removing defamatory statements contained in speeches by candidates for public office. If such censorship were permissible, the Court said, "a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter." *Id.* at 530.

Once the legal inability to censor was recognized, the Court went on to grant the licensee immunity from liability. To do otherwise, the Court noted, would allow the "unconscionable

result" of permitting liability to be imposed for the very conduct the law demands. *Farmers Union*, 360 U.S. at 531. "Quite possibly, if a station were held responsible for the broadcast of libelous material [of political candidates], all remarks even faintly objectionable would be excluded out of an excess of caution." *Id.* at 530.

At least two courts have specifically applied this rationale to student newspapers at public schools. When the crucial control element is missing, that is, when a public school follows the constraints placed on it by the First Amendment and does not exercise content control of the student newspaper, the school is immune from liability. *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981). Thus the legal prohibition against prior restraint protects schools from financial liability for torts that constitutionally and educationally they are in no position to prevent.

IV. HAZELWOOD SCHOOL DISTRICT'S REGULATIONS AS APPLIED TO SPECTRUM STAFF MEMBERS ARE UNCONSTITUTIONALLY OVERBROAD AND VAGUE AND CONSTITUTE A DENIAL OF PROCEDURAL DUE PROCESS.

The Hazelwood School District sought to regulate the content of *Spectrum* through board policies 348.5 and 358.51 and the unwritten requirement that the principal approve all "controversial and sensitive materials" that are to appear in *Spectrum*. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1453-56. Both the district court and the court of appeals failed to conduct an initial evaluation of the constitutionality of these regulations. Unlike the disciplinary regulations at issue in *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), which were used only for subsequent punishment, the rules at Hazelwood East were used to restrict expression before publication. While sanctions applied to a student speaker subsequent to his speech will perhaps survive some vagueness and lack of specificity, *Id.* at 3166, a rule "subjecting the exercise of First Amendment

freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). Student speech, whether within or outside of a public forum, can only be limited when appropriate due process is afforded. *Gambino v. Fairfax County School Board*, 429 F. Supp. 7831, 737 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157, 1977; *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975).

"Invariably, the Court has felt obliged to condemn systems in which the exercise of such [prior restraint] authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious first amendment freedoms is too great where officials have unbridled discretion . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Precision must be the "touchstone" in such analysis. *NAACP v. Button*, 371 U.S. 415, 438 (1965). The First Amendment requires that speech restrictions be "narrowly drawn." *In re Primus*, 436 U.S. 412, 438 (1978). To escape a void-for-vagueness determination, the rules in question must be enumerated with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The regulations of the Hazelwood School District prohibit the publication of material that is libelous, defaming to character, obscene, a "personal attack[]," commercial, outside the rules of "responsible journalism," advocating racial or religious prejudice, or contributing to the interruption of the educational process. *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450, 1455-56 (E.D. Mo. 1985). None of these provisions suggest that stories concerning teenage pregnancy or the effects of divorce on children were impermissible.

Many lower federal courts have followed these guidelines and established that prior restraint regulations in high schools, if they are to exist at all, must meet certain minimal requirements.

Regulations must offer criteria and specific examples so that students will understand what expression is proscribed. *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345, 1349 (4th Cir. 1975); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 976 (5th Cir. 1972). They must detail the criteria by which an administrator might reasonably predict the occurrence of "substantial disruption." *Nitzberg*, 525 F.2d at 383. The regulations must provide definitions of all key terms used, such as "defamatory." *Hall v. Board of School Commissioners*, 681 F.2d 965, 971 (5th Cir. 1982), *Nitzberg*, 525 F.2d at 383, *Shanley*, 462 F.2d at 977. Students must be given the opportunity to know that such rules exist; the regulations must be included in the official school publications or circulated to students in the same manner as other official material. *Nitzberg*, 525 F.2d at 383.

These publication guidelines also must specify to whom the material is to be submitted for approval, *Eisner v. Stamford Board of Education*, 440 F.2d 803, 811 (2d Cir. 1971), and give the students the right to a prompt hearing before the decision-maker where they can argue why distribution should be allowed. *Leibner v. Sharbaugh*, 429 F. Supp. 744, 749 (E.D. Va. 1977).

Procedural due process also requires that publication guidelines limit the time in which the official has to reach a decision on whether to prevent distribution, provide for the contingency of an administrator failing to issue a decision within that reasonable time, and include an expeditious procedure for appealing that administrator's decision. *Baughman v. Freienmuth*, 478 F.2d at 1348, *Eisner v. Stamford Board of Education*, 440 F.2d at 810, *Quarterman v. Byrd*, 453 F.2d 54, 59 (4th Cir. 1971), *Hall v. Board of School Commissioners*, 681 F.2d at 969; *Shanley v. Northeast Independent School District*, 462 F.2d at 977; *Leibner v. Sharbaugh*, 429 F. Supp. at 749. As this Court has noted, "requiring effective notice and an informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action." *Goss*

v. *Lopez*, 419 U.S. 565, 583 (1975). Certainly the liberty interest a student has in free expression is no less significant than the property interest he has in a public education. *Spectrum* staffers were denied all of these procedures.

The regulations of the Hazelwood School District clearly fail to meet constitutional requirements. The danger inherent in the school's policy "shudders the conscience of those to whom the first amendment is sacred." *Shanley v. Northeast Independent School District*, 462 F.2d at 977. Under such a policy, the First Amendment can be "negated by benevolent, though perhaps misguided, satraps of our schools." *Id.* Thus the regulations and the actions based on them must be declared unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEATURES

FEATURES



Sexual assault is not a selective crime. "It can happen to a beautiful woman or a not-so-beautiful woman, nine-month-old child or an 89-year-old woman," says a local police officer. Furthermore, this young lady is a model, not a rape victim. Most news media protect victims by not publishing their names and by not using identifiable photographs. Photo by Steve Bradley.

'Dehumanizing crime': Policeman says rape reports hike statistics; judge gives trials top priority to protect women

By Julie Ramsey

"Rape is the most heinous, dehumanizing crime. Even animals don't do that. It's the ultimate statement," Judge Ted Fox of Harris County said.

But the Uniform Crime Report says that forcible rape increased by nearly 50 percent last year.

Officer Kevin Mahaffey of the Pasadena Police Department thinks it will continue to rise.

He said, "When you look at the numbers that show you rape is increasing, you start acknowledging that the actual occurrence is not going up."

For example, in Pasadena, between January and June 1984, there were 13 reported rapes. Over the same time period in 1983, there were 28, an increase of over 100%. By the way, there is no longer rape in Texas. Unfortunately, however, there is sexual assault. The victim is called "survivor" by the people at the rape clinic.

Officer Mahaffey says that rape is not even a selective crime. "It can happen to a beautiful woman, or a not-so-beautiful woman, nine-month-old child or an 89-year-old woman. No one is exempt from rape."

He said that most rapes happen at the day. Next, that you can never tell who

will be a rapist. But rapists generally fall into one of three categories.

1. The power rapist—He is the most common of the three. He wants to control and have power over someone else.
2. The anger rapist—He has personality problems. He rapes to express his anger, usually leaving the female with injuries and bruises. He wants to humiliate the victim.
3. The sadistic rapist—He is the most violent, he is likely to kill his victim. He usually permeates the rape.

Although these men are clearly a threat, the "survivors" blame themselves.

They might say, "I should have worn something else" or "I should not have

gone there," trying to find the fault in themselves. So they do not report the assault.

The police hope that the increased in reported sexual assault means that women are beginning to realize that the men need to be prosecuted.

Judge Fox likes to give rape trials top priority. He does not want the woman to have to return herself mentally.

He also said that the jury is usually for the woman. The defending lawyer doesn't "blame" her or not her past actions, but is not.

She is not treated anything like what is shown on television.

For said, "Rape is an emotional crime. It's not like having your car stolen. You can always buy another

car."

Officer Mahaffey says it is a great thrill to catch a rapist for officers. The policemen must exercise great self-control when they do.

"Officers often patrol areas and make sure there are no more. One officer received a clerk's money. He went in and caught a rapist in the act. It took a lot for him to keep from harming the man."

People want to help. Organizations to provide counseling and advice services are available. But we may not help unless the assault is reported.

Officer Mahaffey said, "To me, there is nothing worse than what happens to a person than being raped. That's why it's so important to prosecute."

Student tells how sister's rape affected her family

By Julie Ramsey

When the word "rape" is mentioned, some people cringe. Others even joke about it.

But in Harris County alone in 1983 2,000 rapes were reported. The FBI estimates that one in ten rapes are reported; that about 20,000 rapes were committed.

Society seems to know just what to do about the rape—"Throw the person in jail!" But nobody knows what to say to the victim. She and her family are left isolated. My own family is among them.

I would like to share what happened to us partly to give people a better understanding of the victim and her family; maybe help them know what to say and what not to say. But mostly, telling the story will be therapy for myself.

I was 15 years old in April, 1983. I was in Arkansas with my church youth group for the weekend. Two friends and I went for a walk where we were explicitly told not to go.

Three guys drove by, stopped, and asked us if we wanted to cruise. We went, and I think as we went, the guys turned out to be great and we all had a fun time.

Imagine how I felt when Jill told me about her evening.

The very night I was out driving with "Mr. Perfect and Co.," Jill, 17 years old, and a girl friend were asking

permission for permission to a guy when they were to meet some friends.

Jill said, "These guys said they'd take us. It was driving and they said we could sit in the back seat, so we said yes."

The girls were not taken to a guy, but to a rape. Angry, Jill stayed in the car while the others went to look at the rape.

Our guy came back and asked her why she wasn't coming inside. She told him to take them home.

"I guess that looked like it. He looked like a doctor," and my big man became a rape victim.

She said, "I always thought that I'd be able to handle the guy if it happened to me—I'd be in control and hurt him. But I couldn't."

At first Jill was not going to tell me about it. She was afraid of what I would think of her; she was ashamed. I do not know what changed her mind, but she told me on the way home from Arkansas.

All I remember is shock, horror, pain, guilt, and a hundred other emotions at once. I realized I had not been there when she needed me. I tried desperately for what seemed like hours. I knew I should have been there.

I also did not know how I finally convinced her to tell our parents. Like my mother, I have tried to bury in my mind those months following the rape because my family crumbled.

We all built for her, but we were so confused. My mother said that her reaction "blew all behavior patterns" for us. Everyone's emotions were on edge. Everyone was irritable and blew up for almost any reason.

My mother said, "I felt lonely and hurt. Dwight (my father) was so angry that he even suggested spousal abuse. James (13 years old) was defensive, sympathetic, angry, and withdrawn."

"You (Jill) were also defensive and angry, even hostile toward certain people who said things that hurt Jill. You went to your friends for comfort because at home there was no one. There were just wounds."

"Jill felt pain, guilt, worthlessness, and dirty all at once. She would just sit and stare."

Jill was always a sweet, loving, caring person—Even when we were afraid the night to progress, she said, "I've never believed in abortion and I still don't." I think God that all she had was an infection and a cure.

Later she began having worse headaches and she threw up. She even considered suicide. She was under extreme emotional stress and knowing that I could not "make it all better" hurt her tremendously.

Society had nothing to offer her either. She was teased and rumors were spread about her. She said, "I was other treated like a baby, a prostitute,

or ignored." Even by church "friends."

Those who did believe her had no idea what to say. Mother said, "As a preacher's wife I know what people say at weddings, births, deaths, etc. but no one knows what to say about rape or they say nothing at all."

The months after the rape the family had arguments I called "war" from which there was no escape. Jill seemed almost self-destructive. She became irritable and uncooperative. I was more concerned with my sanity. Young my emotions through writing and then took over.

As a family, we began seeing a psychiatrist who helped Jill tremendously. We let her move to Arizona on January 2, to live with our grandparents so she can get a fresh start where no one knows. This was on the doctor's advice.

My family is putting itself back together, but we have hidden the past months as much as possible from each other. The nothing ever happened. Maybe we are better off that way, maybe not.

Grades will seem unimportant to a daughter having been forced to confront reality too soon. I am still struggling with my feelings. On the inside I am still a teen bomb, although I like to think that I have it well.

I still feel guilty that Jill was raped. I know that I was the one who should have been there. She was just asking for

directions. I was playing with strangers.

I became extremely paranoid. I clinged to relationships, hoping to find emotional stability, and spent my time trying to escape reality.

We found out that the guy who raped Jill had been accused of rape before. Sometimes I wonder about the other victims and their families. People who know me know I could never harm anyone. However, if I see that better I smile, I cry.

My mother hired a woman who had two 15-year-old girls. My baby sister's age were abducted and raped. But they were not hurt. I do not believe that for a second.

My family is still hurting. Jill said "There's no getting over it," and I agree with her.

Obviously, I am not an expert on what to say because of the way I moved things up or badly. But thinking of all the things I wish had been different for Jill, I offer this advice: If a girl says she has been raped, believe her. Also keep in mind that she will react differently than what is shown on television.

There are two ways, be supportive, listen to her, and let her be in charge of relationships. On the inside she feels guilty as if she "asked for it," because she did not, or it would not be rape. Committing rape is the crime, not being raped. And never joke about rape—you never know who you are hurting.

Cautious behavior may prevent women from being assaulted

Safety at home
Install a deadbolt lock and a door viewer and use them. Look before opening the door for anyone.
Keep doors locked at all times.
Require all strangers to show identification. If you haven't called a repairman, don't let one inside. Leave him waiting until you contact his employer.
Don't let a stranger inside your home, make the call for him.
Never admit that you are home alone.

Safety tips while driving
Never pick up hitchhikers.
Keep car doors locked at all times.
Before moving your car, look in the back seat.
Always have your back seat to unlock the door.
If possible, always drive on well-lighted, busy streets and avoid isolated back roads and short cuts.

Pack in areas that will be well-lighted where you return.
Women driving alone should never stop to help a stranger.
Safety tips for walking
When possible, avoid walking alone.
Always walk in areas where people are near.
Stay in well-lighted areas, away from bushes, alleys, and dark areas.
Avoid shortcuts through diagonal areas.
Never accept a ride from a stranger.

If a stranger stops to ask for directions, avoid getting too close to the car.
Hold purse and other valuables close to you. Avoid giving them away.
When you return home, have your key ready to open the door when you get home so you can enter without delay.
Above all, be aware of the people and the environment around you.
Safety tips for youth
Teenage babysitters should not accept jobs from people they do not know.

Babysitters should call police immediately if anything suspicious happens in or around the house.
The owner's parents should be called at the end of the evening to inform them that the sitter will be home shortly.
You may follow the advice and safety tips recommended and still find yourself confronted by an attacker. If it happens, you will have only seconds to decide your method of defense, so you must be prepared mentally for the possibility of rape happening to you.

Reporting a rape

The police can only arrest a criminal if they are made aware of the offense. If you are raped, call the police immediately, and if available, call your local rape crisis center.
Don't change clothes or take a bath or shower. All physical evidence, including hair, blood types, and scrapings of flesh from the victim's nails are used in court.

APPENDIX B**SPLC MODEL GUIDELINES
FOR STUDENT PUBLICATIONS****I. STATEMENT OF POLICY**

It is undeniable that students are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States. Accordingly, it is the responsibility of school officials to insure the maximum freedom of expression to all students.

It is the policy of the _____ Board of Education that _____ (newspaper), _____ (yearbook), and _____ (literary magazine), official, school-sponsored publications of _____ High School have been established as forums for student expression. As a forum, each publication should provide a full opportunity for students to inquire, question and exchange ideas. Content should reflect all areas of student interest, including topics about which there may be dissent or controversy.

- It is the policy of the _____ Board of Education that student journalists shall have the ultimate and absolute right to determine the content of official student publications.

II. OFFICIAL SCHOOL PUBLICATIONS**A. Responsibilities of Student Journalists**

Students who work on official student publications will:

1. Rewrite material, as required by the faculty advisers, to improve sentence structure, grammar, spelling and punctuation;
2. Check and verify all facts and verify the accuracy of all quotations;

3. In the case of editorials or letters to the editor concerning controversial issues, provide space for rebuttal comments and opinions;

4. Determine the content of the student publication.

B. Prohibited Material

1. Students cannot publish or distribute material which is "obscene as to minors". Obscene as to minors is defined as:

(a) the average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex; and

(b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals; and

(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Minor" means any person under the age of eighteen.

2. Students cannot publish or distribute material which is "libelous", defined as a false and unprivileged statement about a specific individual which injures the individual's reputation in the community. If the allegedly libeled individual is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice", i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth — without trying to verify the truthfulness of the statement.

(a) A public official is a person who holds an elected or appointed public office.

(b) A public figure is a person who either seeks the public's attention or is well known because of his achievements.

(c) School employees are to be considered public officials or public figures in articles concerning their school-related activities.

(d) When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.

(e) Under the "fair comment rule" a student is free to express an *opinion* on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials and other school employees.

3. Students cannot publish or distribute material which will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott; sit-in, stand-in, walk-out or other related form of activity. *Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.*

(b) In order for a student publication to be considered disruptive, there must exist specific facts upon

which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.

(c) In determining whether a student publication is disruptive, consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar material, past experience in the school in dealing with and supervising the students in the subject school, current events influencing student attitudes and behavior, and whether or not there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.

(d) School officials must act to protect the safety of advocates of unpopular viewpoints.

(e) "School activity" — means educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch periods.

C. Legal Advice

1. If, in the opinion of the student editor, student editorial staff or faculty adviser, material proposed for

publication may be "obscene", "libelous", or "cause a substantial disruption of school activities", the legal opinion of a practicing attorney should be sought. It is recommended that the services of the attorney for the local newspaper be used.

2. Legal fees charged in connection with this consultation will be paid by the board of education.

3. The final decision of whether the material is to be published will be left to the student editor or student editorial staff.

III. PROTECTED SPEECH

School officials cannot:

1. Ban the publication or distribution of birth control information in student publications;

2. Censor or punish the occasional use of vulgar or so-called "four-letter" words in student publications;

3. Prohibit criticism of school policies or practices;

4. Cut off funds to official student publications because of disagreement over editorial policy;

5. Ban speech which merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent lawless action;

6. Ban the publication or distribution of material written by nonstudents;

7. Prohibit the school newspaper from accepting advertising.

IV. NONSCHOOL-SPONSORED PUBLICATIONS

School officials may not ban the distribution of non-school sponsored publications on school grounds. However, students who violate any rule listed under II.B. may be disciplined after distribution.

1. School officials may regulate the time, place and manner of distribution.

(a) Nonschool-sponsored publications will have the same rights of distribution as official school publications.

(b) "Distribution" — means dissemination of a publication to students at a time and place of normal school activity, or immediately prior or subsequent thereto, by means of handing out free copies, selling or offering copies for sale, accepting donations for copies of the publication, or displaying the student publication in areas of the school which are generally frequented by students.

2. School officials cannot:

(a) Prohibit the distribution of anonymous literature or require that literature bear the name of the sponsoring organization or author;

(b) Ban the distribution of literature because it contains advertising;

(c) Ban the sale of literature.

V. ADVISER JOB SECURITY

No teacher who advises a student publication will be fired, transferred or removed from the advisership for failure to exercise editorial control over the student pub-

lication or to otherwise suppress the rights of free expression of student journalists.

VI. PRIOR RESTRAINT

No student publication, whether nonschool-sponsored or official, will be reviewed by school administrators prior to distribution.

VII. CIRCULATION

These guidelines will be included in the handbook on student rights and responsibilities and circulated to all students in attendance.

APPENDIX C

LOGO

LAKEWOOD BOARD OF EDUCATION
EXECUTIVE OFFICES
1470 WARREN ROAD • LAKEWOOD, OHIO 44107

DANIEL M. KALISH
 Superintendent of Schools
 (216) 529-4092

ROBERT W. JERICO
 Deputy Superintendent
 Administration
 (216) 529-4215

GERALD E. MARTAU
 Deputy Superintendent
 Curriculum/Instructional Services
 (216) 529-4094

March 23, 1987

Dear Student Press Law Center:

As Superintendent of Lakewood City Schools I would like to note, for the record, that the Lakewood Schools has never censored its student publication in the past.

We believe that journalism is best learned by helping students exercise the skills of responsible professional journalism. Along these lines we have developed a Journalism Course of Study which stresses these judgmental skills. We have not found it necesasry to interfere in the decision-making process of our student newspaper. Our students have practiced what they have been taught about the responsibilities of good journalism and their constitutional guarantees.

We further believe that in hiring qualified and certified instructors as advisers we are helping to meet our obligation in ensuring that students understand and practice journalism ethics and are aware of legal responsibilities of publications.

Even though our publication may deal with topics readers believe are controversial, our students have done this under the guidelines of professional journalism.

Sincerely,

/s/ Daniel M. Kalish
 Daniel M. Kalish
 Superintendent of Schools

DMK:jom